# PRIVY COUNCIL.

P. C.
1899
*June* 27, 28.
*July* 4, 5.
*November* 11.

BALKISHEN DAS AND OTHERS (DEFENDANTS) *v.* W. F. LEGGE (PLAINTIFF).

On Appeal from the High Court for the North-Western Provinces.

*Sale of land and agreement for re-purchase—Mortgage by conditional sale—Right to redeem—Intention—Regulations I of* 1798 *and XVII of* 1806—*Exclusion of extrinsic evidence to vary written instrument—Act No. I of* 1872, *(Indian Evidence Act), section* 92.

A deed of sale of land for value was accompanied by a deed of agreement between the parties for purchase back by the vendor of the land on payment by him of money to the vendee on a future date fixed. The deeds were followed by transfer of possession to the vendee, and his receipt of the profits.

The vendor did not exercise his right of repurchase; but after many years, gave notice of his intention to redeem, and brought this suit to enforce his right of redemption as upon a mortgage by conditional sale.

*Held*; (1) that oral evidence for the purpose of ascertaining the intention of the parties to the deeds was not admissible, being excluded by the enactment in section 92 of the Indian Evidence Act, 1872.

This case had to be decided on a consideration of the documents themselves, with only such extrinsic evidence of circumstances as might be required to show the relation of the written language to existing facts.

(2) That there were contained in the deeds indications that the parties intended to effect a mortgage by conditional sale. In such a mortgage it is not necessary that the mortgagor should make himself personally liable for the repayment of the loan.

(3) The equity of redemption was rendered applicable to a mortgage of this class by the effect of the Regulation XVII of 1806. The Transfer of Property Act, 1882, section 58, defines a mortgage of this character, stating the already existing law, and practice regarding it; but owing to its date did not apply in this instance.

(4) Redemption had been rightly decreed in the Courts below.

(5) Whether such a mortgage would be redeemable under the Regulation law independently of intention indicated in the instrument was not a point calling for decision. Indications in this case appearing in the deeds were *(a)*, words in the agreement for repurchase similar to those in Regulation I of 1798, relating to the deposit of mortgage money in the Treasury, giving the like power to deposit; *(b)*, the inclusion in the present security of a sum due on an account, open to be increased, other than the price fixed for the repurchase; and other matters. *Bhagwan Sahai* v. *Bhagwan Din* (1) distinguished.

*Present*:—LORDS WATSON, HOBHOUSE, and DAVEY, SIR RICHARD COUCH and SIR EDWARD FRY.

(1) (1890) L. R., 17 I. A., 98; I. L. R., 12 All., 387.

1899

BALKISHEN DAS v. W. F. LEGGE.

APPEAL from a decree (23 April 1897) of the High Court, which affirmed, substantially, a decree (8 February 1895) of the Subordinate Judge of Jaunpur.

The suit was brought by the respondent, William Francis Legge, on the 5th November 1894, for the redemption of an alleged mortgage of the 4th February 1873, on which date he executed to Balkishen Das, the appellant, together with Hari Das, since deceased, a firm of bankers in Benares, a deed of sale to them of his estate, named the Patilah taluk, the price stated being Rs. 1,50,000. The consideration was not paid in cash, but consisted in part of money unpaid upon a previous mortgage to the banking firm effected on the 8th April 1872 by the plaintiff in conjunction with a partner (whom he had since bought out) in carrying on Indigo factories, of which he was the sole owner in February 1873. The rest of the consideration was a balance, retained by the banking firm, of the amount then due on an estimate of expenses for conducting the factories, which they financed for the plaintiff.

A second deed, an ikrarnama, was executed by the banking firm to the plaintiff on the same day, and bore even date with the first deed, the deed of sale. By this ikrarnama the firm agreed that they would sell the taluk back to him if he paid on the 1st March 1876 the sum of Rs. 1,65,000 to them; and it was thereby agreed:—(1) that, if the buyers or their heirs should raise any objections to receiving the money and to relinquishing the property, the seller should be competent to deposit that sum in cash in the Treasury, and thereupon obtain possession;—(2) that if the estimate of the expenditure on the Indigo factories should be varied by consent from year to year, then the seller should be liable to pay along with the sum specified above whatever sum might be found to be due at that time, on the factories account.

On the 6th April 1873 a deed was executed between the parties containing "an estimate of expenditure upon the factories;" and the respondent borrowed money, which was secured to be repaid in December 1873 upon an instrument separately mortgaging the factories; which, after fresh borrowing and another deed of estimate in 1874, were sold on the 25th March 1875,

with some other properties, by the plaintiff to the bankers for Rs. 66,000.

The defence of Balkishen Das and of the sons of Hari Das, as his successors in the firm, was that the transaction of the 4th February 1873 was a sale out-and-out of Patilah, and not a mortgage. They denied that any relation of debtor and creditor was subsisting between the parties, and that any agreement to allow the vendor to repurchase for a specified sum, or any relation of mortgagee and mortgagor, continued after the date fixed for payment of the sum for the repurchase, if it was to take place; that date having been the 1st March 1876.

The question to be decided on this appeal was the main one raised by the issues:—whether the instruments of the 4th February 1873 constituted a mortgage by conditional sale or a sale out-and-out. Oral evidence was admitted on each side at the hearing to explain the intention of the parties to the transaction.

The decision of the Subordinate Judge was in the plaintiff's favour. His judgment was that the deeds on their face constituted a conditional mortgage, and he found that by the ancient custom prevailing, the mortgage by conditional sale was generally effected in that way. He referred to the value of the property, which was in excess of the price stated in the sale deed of 1873, as showing, with clauses in the ikrarnama (including those above mentioned), the intention of the parties to mortgage, and not actually to sell. His decree was for redemption, on payment by the plaintiff of the Rs. 1,65,000 stipulated for the repurchase, with Rs. 6,607 for principal and interest due on a sum left unpaid, on the expenditure estimated, after the sale of the factories in 1875.

This decision was maintained on the defendants' appeal by a Division Bench of the High Court (BANERJI and AIKMAN, JJ.). Their judgment is reported at length in *Balkishen Das and others* v. *W. F. Legge* (1). Upon a consideration of the terms of the ikrarnama, the surrounding circumstances and the oral evidence, they came to the conclusion, in concurrence with the Court below, that the contracting parties intended the transaction to be one of mortgage by conditional sale, and not to be an

(1) (1897) I. L. R., 19 All., 430.

1899

BALKISHEN DAS v. W. F. LEGGE.

absolute sale with merely a right to repurchase on a certain date. They did not regard as a precedent for this case that of *Bhagwan Sahai* v. *Bhagwan Din* (1), which they distinguished from the present.

Mr. *J. D. Mayne* and Mr. *W. Colvin*, for the appellants, argued that the judgments of the Courts below were wrong upon the construction of the deeds of 4th February 1873. The true intent and meaning of those deeds were that they ended the relation of debtor and creditor between the parties, and that the bankers became absolute owners of the taluka, after the 1st March 1876. The buyers were until that date under contract to convey that property back to the plaintiff if he should tender to them on that date Rs. 1,65,000, and should also pay any balance that might then be due under the deed of estimate of expenditure dated the 8th April 1872. Those sums were neither tendered nor paid on that date and therefore the sale was from that date indefeasible. The High Court had erred in holding that there were in the surrounding circumstances reason for their putting a construction upon the deeds of the 4th February 1873 different from that which the words literally bore. Also, in the absence of fraud, and for purposes other than to prove it, the Courts below were wrong in admitting oral evidence. This they had admitted to explain what the parties intended by the deeds that had passed between them, and to vary the meaning of the words used; so that what had been plainly a sale had been construed to have been a mortgage. This was in contravention of sections 92 and 93 of the Indian Evidence Act, 1872, which excluded all evidence taken from outside the written agreement. Besides, the evidence for the plaintiff as to the meaning of the parties, even if admissible, was insufficient to outweigh the express words of the registered document. Again, both the Courts below had relied upon an assumed usage of the people to employ language importing a sale with a view to conveying the effect of a mortgage. This was not borne out by evidence. The appellant had the right to contend that there was upon the true construction of the words used in the deeds, not contradicted by any legal evidence, nor by any evidence rightly understood, a sale for valuable

(1) (1899) L. R., 17 I. A., 98; I. L. R., 12 All., 387.

consideration received by the vendor, coupled with a contract under which he was to be allowed to repurchase the property on a fixed day only. When he had failed to repurchase on that day, the right on his part to obtain possession of the property that had passed from him to the defendants ceased to be exerciseable. From and after the 1st March 1876 the relation of debtor and creditor no longer existed. They were then vendor and purchaser. There was no longer any loan, debt or mortgage after that date, the sale having become absolute.

The decision of this Committee in *Bhagwan Sahai* v. *Bhagwan Din* (1) was then referred to—wherein was cited the judgment in *Alderson* v. *White* (2), to the effect that the rule of law on the subject was the following:—that *primâ facie*, an absolute conveyance, containing nothing to show that the relation of debtor and creditor is to exist between the parties, does not cease to be an absolute conveyance and become a mortgage merely because the vendor stipulates that he shall have a right to repurchase. In *Sital Pershad* v. *Luchmi Pershad Singh* (3), the plaintiff failed to establish that a sale to him, with a right of repurchase, was in effect a mortgage; but in that case there were special circumstances, not presented in this, it was true. The sale in that case was declared to be an acquittance of the debt, and the money for repurchase was only to be received under circumstances personal to the debtor, and not shown. Here, there had been a resort to other modes of securing and of clearing the debt on the factories followed by the sale of them, which in 1875 left a comparatively small balance. The principle that continuing indebtedness was to support the view of continuing mortgage was referred to in *The Manchester, Sheffield and Lincolnshire Railway Company* v. *The North Central Wagon Company* (4).

Mr. *A. Cohen*, Q. C., and Mr. *L. DeGruyther* (Mr. *A. J. Ashton* with them), for the respondent, contended that the judgments of the Courts below were right as to the effect of the deeds of the 4th February 1873. The terms of those instruments, read together, could not but be construed as supporting

(1) (1890) L. R., 17 I. A., 98; I. L. R., 12 All., 387.
(2) (1858) 2 DeG. and J. 105.
(3) (1883) L. R., 10 I. A., 139.
(4) (1888) L. R., 13 A. C. 554, 560.

1899

BALKISHEN DAS v. W. F. LEGGE.

the view that they were intended to operate as a mortgage, and not as a sale out-and-out. Their form was one much used in the North-Western Provinces and elsewhere to constitute a mortgage by conditional sale, termed in the vernacular bai-bil-wafa. It was said to have been the practice of the Muhammadans to employ this form of mortgage, as it avoided, in their opinion, any infringement of their law against the creditor's taking interest from the debtor. Reference was made to Baillie, Moohummudan Law. Supplement "Of Sale," 782, 809. But sale and a right of purchasing back were commonly resorted to in transactions intended to have the effect of mortgages. In the present instance the intention of the parties to mortgage was shown in several ways by the provisions made in the deeds themselves; and, first by the right secured to the vendor, should he conclude to repurchase and should the vendee refuse to accept his tender of the purchase money, to pay it into the District Treasury. That provision was in the words of a clause in Regulation I of 1798 relating to the mortgage by conditional sale, or bai-bil-wafa; secondly, the requirement that advances made, and to be made, for the working of the factories should be repaid at the same time with the payment of the repurchase money; thirdly, the excess of that money, by Rs. 15,000, over the Rs. 1,50,000, the ostensible sale price mentioned in the deed. Next, reference was made to Regulations I of 1798 and XVII of 1806, and the introduction of the right of redemption into the Indian law of mortgage. A statement of that right was not required to be in the deeds themselves, because it was an incident annexed by law without mention in the written contract. Macpherson on Mortgages, 7th ed., pp. 15, 16; Rashbehary Ghose on Mortgages, Tagore Law Lectures for 1877, pp. 136, 139. In 1865 the law of foreclosure in these mortgages was considered in *Forbes* v. *Amir-un-nissa Begam* (1), where the effect of a bai-bil-wafa, or mortgage by conditional sale, was dealt with as resulting from deeds of sale and defeasance in no way different from those in the present case. On the other hand, in *Pattabhiramier* v. *Vencaturao Naicken* (2), which came before this Committee from Madras, to which Presidency the rule of the Bengal Regulations

(1) (1865) 10 Moo., I. A., 346. (2) (1870) 13 Moo., I. A., 560.

1899

BALKISHEN DAS v. W. F. LEGGE.

allowing redemption at any time before foreclosure had not been extended, a sale was held to have become absolute after default. That was on the ground that the English law relating to the equity of redemption was no part of the ancient Indian law and usage in these matters.

With reference to what was laid down in *Alderson* v. *White* (1), as belonging to mortgage, that the relation of debtor and creditor must be intended to continue, it was argued that the state of things as shown to be in contemplation by the ikrarnama of the 4th February 1873 completely satisfied that requirement. The transaction involved that the security should include the debt upon the factory accounts. The principal English cases bearing upon an actual transaction of mortgage receiving effect, though ostensibly a sale, on the first appearance, upon evidence of the intention of the parties to secure repayment according to contract, instead of selling and buying out-and-out, were collected in *Rochefoucauld* v. *Boustead* (2). In *Rakken* v. *Alagappudaya* (3), the intention and agreement were proved by oral evidence and a suit for possession founded on a deed of sale was defeated by proof of a contemporaneous oral agreement for reconveyance on the payment of money borrowed. In that case was cited by the Court *Bakshu Lakshman* v. *Govinda Kanji* (4), and it was held that, without contravention of sections 92, 93 of the Indian Evidence Act, 1872, if it is apparent that the transaction has been treated as a mortgage by the parties, a mortgage it will be held to constitute. The admission of oral evidence was shown by those cases to turn on the necessity of admitting it to expose fraud involved in the conduct of a pretended buyer knowing himself to be mortgagee.

Also were cited *Bhup Kuar* v. *Muhammadi Begam* (5); *Ali Ahmad* v. *Rahmat-ul-lah* (6), where the case of *Bhagwan Sahai* v. *Bhagwan Din* (7) is observed upon; *Rama Sami Sastrigal* v. *Samayappa Nayakan* (8); *Ras Muni Dibia* v. *Prankishen Das* (9).

(1) (1858) 2 DeG. and J., 98.
(2) (1897) L. R., 1 Ch., 196.
(3) (1892) I. L. R., 16 Mad., 80.
(4) (1880) I. L. R., 4 Bom., 405.
(5) (1883) I. L. R., 6 All., 37.
(6) (1892) I. L. R., 14 All., 195.
(7) (1890) L. R., 17 I. A., 98. I. L. R., 12 All., 387.
(8) (1881) I. L. R., 4 Mad. 179.
(9) (1848) 4 Moo., I. A., 392.

1899

BALKISHEN DAS v. W. F. LEGGE.

Mr. *J. D. Mayne* replied.

Afterwards on the 11th November 1899 their Lordships' judgment was delivered by LORD DAVEY.

In and prior to the year 1872 Hari Das and the appellant Balkishen Das carried on business as bankers at Benares. Hari Das was the managing partner. He died on the 27th April 1889. The present appellants are Balkishen Das and the two sons and heirs of Hari Das. The respondent was at that time the owner of a taluka called Patilah in the district of Jaunpur and was also half-sharer of certain indigo factories known as Basharatpur, and carried on the business there in partnership with one De Momet, his co-sharer. By a deed dated the 8th April 1872 the taluka was mortgaged to Hari Das and Balkishen Das for Rs. 1,25,000 and by another deed of the same date (called a deed of estimate) the factories were also mortgaged to them as security for Rs. 60,000, which sum was to be applied partly in payment of previous debt and partly in providing for the necessities of the indigo business for the current year. At the end of the year 1872 it was found that the business had been carried on at a loss. The debt due to the bankers was Rs. 1,90,000 and further advances were needed for carrying on the business. The respondent in these circumstances bought out his partner De Momet and became sole owner of the factories and solely interested in the business. A fresh bandobast or settlement was thereupon made between him and the bankers and was carried into effect by three deeds, of which two relating to the taluka were dated the 4th February 1873 and the third relating to the factories was dated the 6th April 1873.

The first deed of 4th February 1873 was, on the face of it, an absolute sale by the respondent to the bankers for the price of Rs. 1,50,000, which was expressed to be paid in the following manner, *viz.* the bankers retained out of the Rs. 1,50,000 the sum of Rs. 1,37,333-6-0 principal with interest up to date which had by calculation been found due by the respondent to the bankers under the mortgage deed of the taluka dated 8th April 1872 and retained the balance Rs. 12,666-10-0 in part payment of the amount then due on the deed of estimate of expenses for conducting the factories of the Basharatpur concern.

The other deed of the 4th February 1873 was in the following terms :—

"We, Babus Hari Das and Balkishen Das, sons of Babu Padam Das, "proprietors of the firm of Babu Madhuban Das and Dwarka Das, caste "Gujrati, resident of mohalla Gwaldas, in the city of Benares, do declare as "follows:—

"The vendor, Mr. William Francis Legge, having, under the sale-deed dated "4th February 1873, sold absolutely, for Rs. 1,50,000, his zamindari right and "property in the entire 16 annas of taluka Patilah, pargana Ungli, in the "district of Jaunpur, comprising 25 villages, original and attached, together "with all sir, sayer items, high and low lands, water and forest produce, water "places and tanks, cultivated, uncultivated, saline, waste and jungle lands; "village sites, ponds, katcha and pakka wells, collection houses, tenants' "quarters, bamboo clumps, groves and detached fruit and timber trees of "all sorts, and stone and wooden mills, inclusive of all the zamindari rights and "interest appertaining to the said taluka, without exclusion of any right or "property, to us, the executants, has caused mutation of names to be effected. "We, the executants, therefore, of our own free will and accord, covenant and "declare that if the said vendor pays on 1st March 1876, the amount of "Rs. 1,65,000 in a lump sum, we shall sell to the said vendor the whole of the said "ilaka sold, as it exists at present, for the said amount of Rs. 1,65,000, and "we shall cause everything connected with mutation of names, &c., to be "done, neither we nor our heirs shall have any objection thereto. If we or "our heirs raise any objection to receive the money and relinquish the "property, the vendor shall be competent to deposit the said amount in cash "in the treasury, by virtue of this agreement, and obtain possession over the "ilaka, we shall have no sort of objection to it. It has further been stipulated "by the executants and the vendor that if the amount of the estimate money "of the Basharatpur concern should keep varying on account of alterations "made by consent of us, executants, from year to year, then the vendor shall be "liable to pay along with the sum abovementioned, whatever sum may be "found to be due at that time by him to us executants. The sahib shall not be "competent to effect a sale until the payment of the estimate money relating "to the factories of the Basharatpur concern. We shall recover from the vendor "any amount of arrear that may be due to us by the cultivators by making "an assignment thereof in favour of the vendor, and after the expiry of 1st "March 1876, the said vendor shall not be competent either to pay the money "or to make the purchase and the conditions of this deed of agreement shall "be deemed to be null and void."

The question between the parties in this appeal is whether the two deeds together constituted a mortgage of the taluka or an out-and-out sale with a contract of repurchase.

After the execution of these deeds the bankers made further advances to the respondent to a large amount on account of the

1899

BALKISHEN DAS v. W. F. LEGGE.

Basharatpur concern. By the third deed dated the 6th of April 1873 the sum of Rs. 44,223-14-3 was found due from the respondent up to date, and he mortgaged the factories for Rs. 75,000, out of which the balance was paid off and money was provided for working the factories during the current year.

On the 3rd of March 1874 another deed of estimate was executed for that year, and finally by a deed dated the 25th March 1875 the respondent sold and conveyed the factories to the bankers for a price which left him a debtor to them in the sum of Rs. 5,953-4-3. There is no deed of defeasance to this deed and it was admittedlyan absolute sale.

It should be noticed that on the execution of the deeds of 4th February 1873 the necessary mutation of names was made and the bankers entered into and have ever since been in possession or receipt of the rents and profits of the taluka.

The respondent did not buy back or redeem the property on the 1st of March 1876. But on the 5th of November 1894 he commenced the present action for redemption of the taluka, alleging that the deeds of 4th February 1873 constituted a mortgage by conditional sale with possession thereof. The defendants and present appellants, on the other hand, contended that the transaction was an absolute sale with a contract of resale, and the time having expired and the condition not having been fulfilled the contract had become null and void.

The Subordinate Judge held that the documents in question were deeds of mortgage by conditional sale and that the respondent was entitled to redemption. His judgment was affirmed by the High Court.

Evidence of the respondent and of a person named Man was admitted by the Subordinate Judge for the purpose of proving the real intention of the parties, and such evidence was to some extent relied on in both Courts. Their Lordships do not think that oral evidence of intention was admissible for the purpose of construing the deeds or ascertaining the intention of the parties. By section 92 of the Indian Evidence Act (Act 1 of 1872) no evidence of any oral agreement or statement can be admitted as between the parties to any such instrument or

their representatives in interest for the purpose of contradicting, varying or adding to, or subtracting from, its terms, subject to the exceptions contained in the several provisoes. It was conceded that this case could not be brought within any of them. The cases in the English Court of Chancery which were referred to by the learned Judges in the High Court have not, in the opinion of their Lordships, any application to the law of India as laid down in the Acts of the Indian Legislature. The case must therefore be decided on a consideration of the contents of the documents themselves with such extrinsic evidence of surrounding circumstances as may be required to show in what manner the language of the document is related to existing facts.

Mortgages by conditional sale under various names are a common form of mortgage in India and have come before this Board in several reported cases. It has been stated that this form of mortgage was introduced to enable Muhammadans, contrary to the precepts of their religion, to lend money at interest and obtain security for principal and interest. If so, one would expect to find that the transaction would, as far as possible, be made to assume the appearance of a sale. It is not necessary in a mortgage by conditional sale "kutkubala" or "bai-bil-wafa" that the mortgagor should make himself personally liable for the repayment of the loan (*see* Macpherson on Mortgages, 5th edition, p. 11).

By Bengal Regulation I of 1798, intituled "a regulation "to prevent fraud and injustice in conditional sales of land "under deeds of bai-bil-wafa or other deeds of the same nature," provisions were made for the case of the lender refusing to receive the money on the day named. The borrower was empowered to deposit the amount due on or before the stipulated date in the Dewanny Adawlut of the city or zillah in which the land may be situated. If the lender has obtained possession of the land, the principal sum only need be deposited, leaving the interest to be settled in an adjustment of the lender's receipts and disbursements during the period he has been in possession. By Regulation XVII of 1806 the mortgagor under deeds of this description was empowered to redeem the

1899

BALKISHEN DAS v. W. F. LEGGE.

land at any time within one year after the commencement of proceedings to foreclose the mortgage or render the sale conclusive, provided that payment or tender be proved or deposit be made within the time above specified in the manner specified in the previous Regulation.

In the case of *Pattabhiramier* v. *Vencatarow Naicken* (1) it was decided that according to the ancient law of India a mortgage by conditional sale was enforceable according to the letter or (to use the language of English lawyers) time was of the essence of the contract. The effect of the Regulation of 1806 was therefore to introduce into those parts of India to which the regulation applies the English doctrine of an equity of redemption as applicable to the class of deeds referred to in it.

Mortgages of this character are thus defined in clause (*c*) of section 58 of the Transfer of Property Act, 1882: "Where the mortgagor ostensibly sells the "mortgaged property on condition "that on default of payment of the mortgage money on a certain "date the sale shall become absolute, or on condition that on such "payment being made the sale shall become void or on condition "that on such payment being made the buyer shall transfer the "property to the seller, the transaction is called a mortgage by conditional sale." The Transfer of Property Act does not apply to this transaction, but it may be assumed that the framers of it in this section intended to state the existing law and practice of India.

The appellants argue that the language, whether of this Act or of the Regulations, shows that in order to attract their provisions there must be underlying ostensible arrangements for sale a real substantial intention to secure money advanced. They rely on the decision of this Board in the case of *Bhagwan Sahai* v. *Bhagwan Din and others* (2). Their Lordships decided that case on the language of the deeds then in question, which they evidently considered showed that the transaction was not such a transaction as is described in the Regulation of 1806, and there was therefore no right of redemption

(1) (1870) 13 Moo., I. A., 560. (2) (1890) L. R., 17 I. A., 98; I. L. R., 12 All., 387.

after the expiry of the date fixed. The appellants contend that such ought to be the conclusion in the present case, seeing that the parties did stand in relation of lender and borrower prior to 1873, and then expressly altered it into that of buyer and seller. The respondents, on the other hand, contend that a conditional sale becomes subject to an equity of redemption by force of the regulations before mentioned independently of any indications in the document that it is intended to be a mortgage. This is a question on which their Lordships are not called on to express an opinion in this case, for the documents in question contain important indications of the intention of the parties. The second deed or ikrarnama provides that if the bankers object to receive the money and relinquish the property, the vendor may deposit the amount in the treasury "by virtue of this agreement" and obtain possession over the ilaka. This provision at once suggests a reference to Regulation I of 1798 as being in the opinion of the parties applicable to the case. It was not suggested that there was any other statutory provision or practice by which such deposit could be made by virtue of the agreement alone without the intervention of the Court in a suit for the purpose, while, on the other hand, the words exactly describe the procedure under the Regulation. Again, the estate was made redeemable only on payment as well of the amount which should be found due at the time of redemption on account of the Basharatpur concern as of the stipulated sum of Rs. 1,65,000. The practical effect of this was to consolidate the debt on the factories account with the principal sum mentioned in the deed and to give the bankers a security on the taluka for the debt of the factories. This gives the transaction the character of a mortgage so far as the factory accounts are concerned, and if it is to some extent a mortgage it may well be held to be so entirely. There was also some evidence, though not very precise, that the property in the year 1873 was worth considerably more than Rs. 1,50,000. This was accepted in the Court below, but their Lordships do not place much reliance upon it.

Their Lordships hold that the transaction was intended to be, and was, a mortgage by conditional sale, and they will therefore

1899

BALKISHEN DAS v. W. F. LEGGE.

humbly advise Her Majesty that the appeal be dismissed. The appellant will pay the costs of it.

*Appeal dismissed.*

Solicitors for the appellants—Messrs *Ranken, Ford, Ford* and *Chester*.

Solicitors for the respondents—Messrs. *Young, Jackson, Beard* and *King*.

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## CIVIL REFERENCE.

1899
*November* 20.

*Before Sir Arthur Strachey, Knight Chief Justice and Mr. Justice Banerji.*

CHAND MAL AND OTHERS (APPLICANTS) *v.* LACHHMI NARAIN (OPPOSITE PARTY).*

*Act No. V of* 1881 *(Probate and Administration Act), section 3—Probate —Will—Document intended to take effect partly in the life-time of the executant and partly after the executant's death.*

There is no objection to one part of an instrument operating *in praesenti* as a deed and another *in futuro* as a will. *Cross* v. *Cross* (1) referred to.

THIS was a reference under sections 17 and 18 of the Ajmere Courts' Regulation (No. 1 of 1877). The facts out of which it arose appear from the order of reference, which was as follows :—

"The plaintiffs in the above case applied, on the 29th March, 1898, to the Commissioner, Ajmere-Merwara as District Judge of Ajmere, under section 56 of the Probate and Administration Act (V of 1881) for the grant of probate of a document purporting to be the will, executed on the 10th April 1887, of Musammat Gulab Kunwar, widow of Seth Sobhagmal of Kuchawan. The said Musammat Gulab Kunwar died on the following day, *viz.*, on the 11th April 1887, at Ajmere, leaving, as is alleged, assets to the value of Rs. 7,200 at Beowar and Pushkar within the Ajmere District.

"After the application for probate was made the defendant Lachhmi Narain, minor son of Seth Har Narain, deceased, of Ajmere, by his guardian his mother Musammat Gopi, lodged a caveat, contending *inter alia* that the will was not genuine, that Musammat Gulab Kunwar had only a life interest in the

* Miscellaneous No. 166 of 1899.

(1) (1846) 8 Q. B., 714; S. C.; 15 L. J., (N. S.) Common Law, 217.