

however, of the series of rulings abovementioned, I accept the view taken by my learned brother, and agree in his order, which will also be the order of the Court.

Appeal allowed.

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CHHOTEL LAL

vs.
SHEOPAL
SINGH.

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December, 23.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Twdball.

GHULAM NABI KHAN (PLAINTIFF) v. NIAZ-UN-NISSA (DEFENDANT)*

Construction of document—Sale—Agreement to repurchase executed on same day—Mortgage by conditional sale.

When what purported to be an out-and-sale was accompanied by a contemporaneous agreement giving to the vendor a right of repurchase within five years at the same price, it was held that the transaction was what it purported to be, and could not be construed as a mortgage by conditional sale. *Bhagwan Sahai v. Bhagwan Din* (1) followed. *Vasudeo v. Bhan* (2) referred to.

THE facts of this case were as follows:—

A sale-deed was executed in favour of the respondent on 12th August, 1894. On the same day another deed was executed between the parties which provided that if the purchase money were paid within five years, the transferee would reconvey the property to the vendor, and the sale would be deemed to be non-existent. This was a suit by the appellant vendor to redeem the property on payment of purchase money on the basis that the two deeds made the transaction a mortgage by way of a conditional sale. The court of first instance (Subordinate Judge of Moradabad) dismissed the suit, and this decree was affirmed on appeal by the District Judge. The plaintiff appealed to the High Court.

The Hon'ble *Nawab Muhammad Abdul Majid* (with him Mr. B. E. O'Connor), for the appellant, contended that the two documents must be read together as constituting a mortgage by conditional sale. In the case of *Bhagwan Sahai v. Bhagwan Din* (1) the vendees promised to reconvey as a matter of grace. Moreover that case was decided on principles of common law and did not apply. He cited *Ali Ahmad v. Rahmat-ul-lah*, (3) and referred to section 58, clause (c) of the Transfer of Property Act.

* Second Appeal No. 723 of 1910 from a decree of A. W. B. Cole, District Judge of Moradabad, dated the 3rd of May 1910, confirming a decree of Nihal Chandra, Subordinate Judge of Moradabad, dated the 11th of August 1909.

(1) (1890) I. L. R., 12 All., 387. (2) (1896) I. L. R., 21 Bom., 528.
(3) (1882) I. L. R., 44 All., 195.

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Mr. G. P. Boys (with him Manvi Ghulam Muftaba), for the respondent, relied on *Bhagwan Sahai v. Bhagwan Din* (1) and submitted that the case was exactly like the present. The parties intended to create a transfer out-and-out. He further relied on *Vasudeo v. Bhanu* (2).

STANLEY, C. J. and TUDBALL, J.—This appeal arises out of a suit for redemption of an alleged mortgage of the 12th of August, 1894. On that date a sale-deed was executed and a contemporaneous agreement whereby the vendee undertook to reconvey the property comprised in the sale-deed on repayment of the amount of the purchase money within a period of five years. The period of five years has long since elapsed, and consequently the agreement to reconvey is not capable of being enforced unless the transaction is regarded as in the nature of a mortgage by way of conditional sale.

Both the lower courts dismissed the plaintiff's suit on the ground that the sale-deed represented an out-and-out sale, and that the agreement whereby the vendee undertook to reconvey the property on payment of the purchase money within a limited time did not convert the sale into a mortgage by way of conditional sale.

This second appeal has been preferred and reliance has been placed upon the language of section 58 of the Transfer of Property Act. It is to be observed in this case that there are two documents to be interpreted and that the decision of it depends upon the true construction to be placed on those documents. If we come to the conclusion that the sale-deed represented, and was intended to be, an out-and-out sale, then it appears to us that, there being nothing illegal in the agreement of the parties, we should hold it to be an out-and-out sale, and that inasmuch as the purchase money was not paid within the time agreed upon, the plaintiff is not entitled to recover the property. It appears to us that the case is concluded by the decision of their Lordships of the Privy Council in *Bhagwan Sahai v. Bhagwan Din* (1). In that case a document purporting to be one of sale was accompanied by a contract whereby a right was reserved to the vendor of

(1) (1890) L. L. R., 12 All., 397, 391.

(2) (1893) I. L. R., 21 Bom.; 528.

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repurchasing the property sold on repayment of the purchase money within a certain time, and it was held that the transaction was not to be regarded as a mortgage by conditional sale. Their Lordships in their judgement quote a statement of the law pronounced by LORD CHANCELLOR GRANWORTH in the case of *Alderson v. White* (1) when dealing with the question whether or not what purported to be a deed of sale on its face was really a mortgage, and read the following passage:—"In every such case the question is, what upon a fair construction is the meaning of the instruments? Here the first instrument was on the face of it an absolute conveyance; the second gave a right to repurchase on payment, not of what should be due, but of the full amount of the purchase money of £ 4,739, exactly corresponding to the terms of the two documents in the present case, whereby the vendee gave the right to the vendors to take back the property if within the period of ten years they should pay the same amount, namely, Rs. 4,000. Was that, if taken according to its terms, a lawful contract? Clearly so. What then is there to show that it was intended to be a mere mortgage? I think that the court after a lapse of 30 years ought to require cogent evidence to induce it to hold that an instrument is not what it purports to be, and I see but little evidence to that effect here." It seems to us that this language of the LORD CHANCELLOR is closely applicable to the facts of the present case. We find in the document which is described as a deed of sale, a recital that "the sale had become absolute and final, and that the contracting parties had no right to cancel the sale and to demand restitution of the consideration money, and that the vendor has no right to any share in the property sold." In view of this language can we say that what purports to be a sale is in reality a mortgage? A stipulation for repurchase will not of itself convert a case of sale into one of mortgage. To make a mortgage there must be a debt—*Vasudeo v. Bhau* (2). If there be a right to redeem property from a debt, there must also be the correlative right to enforce payment of the debt. Here there is clearly no debt. Whether a transaction is a *bond fide* sale with an agreement for repurchase or a

(1) (1858) 2 De. Gex. and J. 97 (105); (2) (1896) I. L. R., 21 Bom., 528.
 44 R. R., 934 (928).

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mere mortgage in the form of a sale must depend on the intention of the parties to be gathered from the language in which the transaction is carried out, supplemented, it may be, by oral evidence. If we attach their true meaning to the recitals which we have referred to above, it must, we think, be held that the transaction was intended by the parties to be an out and out sale with an agreement for repurchase. In view of the language used we are of opinion that the courts below rightly held that the plaintiff had no right to redeem the property. If he intended to rely upon the agreement for repurchase, he ought to have paid his money within the time limited by the document. Having failed to do so, he must abide the consequences. We dismiss the appeal with costs.

Appeal dismissed.

P. C.

1911

February 14.

PRIVY COUNCIL.

HANIF-UN-NISSA AND ANOTHER (DEFENDANTS) v. FAIZ-UN-NISSA AND ANOTHER (PLAINTIFFS.)

[On appeal from the High Court of Judicature at Allahabad.]

Act No. 1 of 1872 (Indian Evidence Act), section 92—Admissibility of evidence to show that a document purporting to be a sale-deed is in reality a deed of gift.

In the appeal their Lordships were of opinion that the decree of the High Court in *Faiz-un-nissa v. Hanif-un-nissa* (1) could not be supported and remitted the case to the High Court to be dealt with on the evidence.

APPEAL from a judgement and decree (17th April, 1905) of the High Court at Allahabad, which reversed a decree (5th November, 1902) of the Additional Subordinate Judge of Allahabad.

The main questions for determination on this appeal were, (a) whether a deed of sale, dated the 27th of September, 1889, executed by the plaintiff (respondent) in favour of the appellants and another, embodied a genuine transaction, or was merely a fictitious deed; and (b) whether or not the appellants should be allowed to give parole evidence for the purpose of showing that the executant of the aforesaid deed, which purported

Present:—Lord MACNAGHTEN, Lord ROBSON, Sir ARTHUR WILSON and Mr. AMEER ALI.