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BETI KUNWAR v. JANKI KUNWAR.

case therefore does not help the appellants. Moreover, under the agreement of the 8th of September, 1893, referred to above, Duni Kunwar acquiesced in the arrangement by which a fourth share was assigned to her and as she was admittedly in possession of a fourth share at the date of the suit she had no cause of action. For these reasons we hold that the suit brought by her was bound to fail and has been rightly dismissed by the court below. We accordingly dismiss this appeal with costs. Janki Kunwar and Shiam Bihari respondents will get separate sets of costs.

Appeal dismissed.

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July 30.

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

WAJID ALI KHAN (PLAINTIFF) v. SHAFAKAT HUSAIN (DEFENDANT).*

Construction of document—Sale subject to agreement executed on the same day reserving right to vendor to repurchase—Documents to be read together—Mortgage.

Two documents were executed by the same parties on the same day. The first purported to be an out and out sale of certain property, but was expressed to be "subject to the terms of the deed of agreement executed by the vendee." The agreement referred to was an agreement under certain conditions to reconvey the property purchased. Held that in the circumstances the two documents must be read together as constituting a mortgage by conditional sale. *Bhagwan Sahai* v. *Bhagwan Din* (1) distinguished.

THIS was a suit for redemption of a mortgage constituted, as alleged by the plaintiff, by two documents of even date, the first being a sale deed, the second an agreement for the repurchase of the property under certain conditions by the vendor.

The court of first instance decreed the suit. The lower appellate court reversed the decree. The plaintiff appealed to the High Court. The material portions of the documents upon the construction of which the case turns are set forth in the judgement of the court.The question was whether the two documents were to be read together as constituting a mortgage by conditional sale.

Maulvi *Ghulam Mujtaba*, for the appellant.

Maulvi *Muhammad Ishaq*, for the respondent.

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* Second Appeal No. 1176 of 1909 from a decree of E. M. Nanavati, Additional Judge of Bareilly, dated the [illegible] 1909, confirming a decree of Syed Abdul Hasan, Munsif of Havali, [illegible].

(1) (1890) I. L. R., 12 All., 387.

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STANLEY, C. J., and GRIFFIN, J.:—The question in this appeal is whether two documents both dated the 30th April, 1897, are to be read together, and, if so read, constitute a transaction amounting to a mortgage. The lower appellate court has read them separately and has treated the transaction as an out and out sale with an agreement to repurchase within a limited period. The suit out of which this appeal has arisen was brought for redemption of the property. The court of first instance decreed the claim, but upon appeal the lower appellate court reversed the decision of the court of first instance and dismissed the plaintiff's claim holding that the two documents in question were not to be read together, but separately, and so read constituted a sale and independent agreement for repurchase. We are of opinion that the lower appellate court was wrong in the construction which it placed on the documents. The first of the two documents purports to be an out and out sale, but at the end of the instrumen the vendor declares that he has executed "this sale-deed subject to the terms of the deed of agreement executed by the vendee on the 30th April, 1897." This incorporates by reference the document of even date. By that document the vendee declares that the property was sold to him upon the condition that after the expiration of a period of six years from 1311 Fasli to 1315 Fasli whenever the consideration is repaid to him or his representative or tendered to him or deposited in his favour by the vendor or his representative with a view to take back the property sold, he (the vendee) shall without hesitation reconvey the property sold and execute a sale-deed in favour of the vendor or his representative and have it completed.

Further, in this document, the vendee undertakes that whenever during the period from 1311 to 1315 Fasli the vendor or his representative pays or tenders to or deposits for him or his representative a lump sum of Rs. 635 the remaining amount of consideration money, he shall without hesitation convey back the property. We have no doubt in view of the language of these two documents that they must be read together as constituting a mortgage by way of conditional sale. The case is unlike that which is relied on by the learned vakil for the respondent, namely,

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Bhagwan Sahai v. *Bhagwan Din* (1). In that case it was held by their Lordships of the Privy Council that a document purporting to be one of sale, though it was accompanied by a contract reserving to the vendor a right to property sold, or repayment of the purchase money within a certain time, was not on that account to be construed as if it were a mortgage. In that case the document first executed was in terms an out and out sale. The document which was afterwards executed though of the same date was not executed in pursuance of any agreement entered into between the parties, but, on the contrary, was executed by the vendee "as a matter of favour, mercy, kindness and indulgence." Sir BARNES PEACOCK in delivering the judgement of their Lordships observed that it seemed clear from the decision of Lord Chancellor CRANWORTH in the case of *Alderson* v. *White* (2) that it was not a mortgage. He quoted the following words of the Lord Chancellor:—"These deeds taken together do not on the face of them constitute a mortgage, and the only question is whether, assuming the transaction to be a legal one, it has been shown to be in truth such as in the view of a court of equity ought to be treated as a mortgage transaction. The rule of law on this subject is one dictated by common sense 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." Then his Lordship proceeds :—"In this case the vendors did not stipulate that they should have a right to repurchase." It will be at once observed how different are the facts of that case from the case which is before us. Here the deed which is alleged to be a deed of sale is made expressly subject to the condition mentioned in the contemporaneous document and the contemporaneous document is an agreement on the part of the vendee to reconvey the property to the vendor upon repayment of the purchase money.

We are of opinion that the view of the learned Additional Judge is erroneous, and as he decided the appeal before him upon this point and we have over-ruled him in regard to it, we set aside

(1) (1890) I. L. R., 12 All., 387. (2) (1858) 2 De Gex & J., 105.

the decree of the lower appellate court and remand the case to it under the provisions of order XLI, rule 23, with directions that it be re-admitted under its original number in the register and determined according to law. Costs here and hitherto will abide the event.

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Appeal decreed. Cause remanded.

PRIVY COUNCIL.

P. C. 1910. *November* 9, 10. *December* 2.

MUHAMMAD BAKAR AND ANOTHER (PLAINTIFFS) *v.* MUHAMMAD BAKAR ALI KHAN AND ANOTHER (DEFENDANTS).

[On appeal from the Court of the Judicial Commissioner of Oudh, at Lucknow.]

Settlement of Oudh—Taluqdar settled with on terms as to which no evidence could be given—Second summary settlement—Villages inluded in taluqdar's estate and not recovered by payment of money due on account of them—Trustee or lien-holder—Redemption barred by Act No. I of 1869, *section* 6—*Adverse possession.*

This appeal related to certain villages in Oudh which belonged prior to the annexation of that Province to the widow of the predecessor in title of the appellants, and were, under some arrangement of the exact nature of which there was no evidence, included in the estate of the ancestor of the respondent, a taluqdar, in whose possession they were found at the settlement in 1859. The widow at that time applied as owner for the settlement of the villages. Her claim was resisted by the agent of the taluqdar on the ground that he was entitled to possession until sums paid by him on account of the villages were paid off; and the settlement was made "in accordance with possession," the widow being directed by the settlement officer to proceed by separate application to get the villages released by payment of the money due by her; but she took no steps to get the property released; and when in 1867 she applied for regular settlement of the villages her claim was dismissed on 31st October 1868, on the ground that they were included in the sanad granted by Government to the taluqdar. In a suit brought in 1905 by representatives of the widow for possession of a share of the property on the ground that the settlement proceedings in 1859 constituted the taluqdar either a mortgagee or a trustee on behalf of the widow it was admitted that the claim for redemption was barred by section 6 of Act No I of 1869.

Held (upholding the decision of the Court of the Judicial Commissioner) that there was no warrant for the contention that the correlative obligation that lay on the taluqdar to release the villages on payment of the money due on account of them created a trust or constituted him a trustee for the widow, who took no steps to comply with the directions of the settlement officer, and allowed

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