the date of the order of adjudication spoke for themselves and constituted really the sole evidence to which it was necessary for the Receiver to refer in order to establish the invalidity of this deed. The appeal must be allowed with costs and the deed declared void under section 16. We may say that we entirely agree with the learned Judge that no case was made out under section 37.

Appeal allowed.

Before Sir Grimwood Mears, Knight, Chief Justice, and Mr. Justice Muhammad Rafiq.

MUHAMMAD HAMID-UD-DIN (PLAINTIFF) *v.* FAKIR CHAND AND OTHERS (DEFENDANTS.)*

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March, 26.

Construction of document—Sale or bai-bil-wafa—Ostensible sale with collateral agreement for repurchase—Agreement containing terms as to payment of interest and accounting for the profits of the property sold.

Of two documents executed on the same day and between the same parties the first purported to be an absolute sale of a certain village. The second was an agreement on behalf of the vendees, the material terms of which were as follows. After a description of the property purchased, the agreement continued with a recital that the property had been purchased by the executants for Rs. 6,125 "*on this condition* that whenever within five years the vendors shall pay to us the amount of consideration mentioned in this document we or our heirs shall have no objection in re-conveying the aforesaid share. If we set up any plea the same shall be invalid and the vendors shall be at liberty to take legal steps and to have the property reconveyed by us . . . . They shall also have to pay interest on the whole consideration at the rate of 10 annas per cent., per month, out of which the actual produce of the village sold shall be deducted, and they shall have to pay the balance along with the consideration money."

Held that the terms of the agreement that interest should be paid on the purchase money and that the profits of the village should be taken into account in order to ascertain the actual sum which the vendors would have to pay in order to recover the property indicated that the transaction was not merely a sale with a condition for repurchase but a bai-bil-wafa or mortgage by conditional sale. *Alderson* v. *White* (1), *Bhagwan Sahai* v. *Bhagwan Din* (2), *Ghulam Nabi Khan* v. *Niaz-un-nissa* (3) and *Jhanda Singh* v. *Wahid-ud-din* (4) referred to.

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* First Appeal No. 315 of 1917, from a decree of Ram Chandra Saksena, Additional Subordinate Judge of Moradabad, dated the 23rd of March, 1917.

(1) (1858) 2 De Gex and J., 97.
(2) (1890) I. L. R., 12 All., 387.
(3) (1910) I. L. R., 33 All., 337.
(4) (1916) I. L. R., 38 All., 570.

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MUHAMMAD HAMID-UD-DIN v. FAKIR CHAND

THE facts of this case are fully stated in the judgment of the Court.

Mr. *Muhammad Ishaq Khan* and Mr. *B. E. O'Conor*, for the appellant.

The Hon'ble Dr. *Tej Bahadur Sapru* and Dr. *S. M. Sulaiman*, for the respondents.

MEARS, C. J., and RAFIQ, J. :—This appeal arises out of a suit brought by the plaintiff appellant in the lower court for the redemption of an alleged mortgage-deed, dated the 21st of July, 1883. It appears that on that date two ladies, Musammat Ishrat-un-nissa and Musammat Shafkat-un-nissa, executed a deed of sale in favour of Lala Fakir Chand and Lala Baldeo Sahai. The consideration for the sale was Rs. 6,125. On the same day (*i. e.*, the 21st of July, 1883,) the two Lalas executed a deed of agreement in favour of the two ladies, in which, after reciting the fact of their purchase, they said that the purchase had been made subject to the condition that the two ladies could, on the payment of Rs. 6,125 within 5 years from the date of the execution of the agreement, get back the property. The two ladies are dead and so is Lala Baldeo Sahai. The plaintiff appellant is the husband of Musammat Shafkat-un-nissa. He brought the suit out of which this appeal has arisen against the surviving vendee Lala Fakir Chand and the heirs of the other vendee. The claim was brought on the 12th of September, 1916, on the allegation that the transaction evidenced by the two deeds of the 21st of July, 1883, was really a conditional sale, *i. e.*, a mortgage. The claim was resisted on various grounds, but the principal plea was that the sale of the 21st of July, 1883, was an out-and-out sale and the agreement of the same day was a separate transaction for recoveyance of the property within a specified period. As the claim has not been brought within 5 years of the execution of agreement and as the claim was not for re-conveyance of the property but for redemption of the mortgage, the claim was not maintainable.

No evidence was given on behalf of the plaintiff appellant, by which we mean no oral or documentary evidence, other than the two deeds, dated the 21st of July, 1883. Some witnesses were examined on behalf of the defendant respondents to

prove that the two deeds of the 21st of July, 1883, evidence really two separate transactions. The learned Subordinate Judge who heard the witnesses has not believed them, nor has their evidence been placed before us in this appeal. The case has been decided on the language of the two deeds of the 21st of July, 1883, and in the light of the case-law put forward before the court below. The learned Subordinate Judge yielded to the plea for the defence and construed the two documents of the 21st of July, 1883, to mean that they showed two separate transactions, one an absolute sale and the other an agreement of re-conveyance within a specified time.

In appeal before us the appellant contests the conclusion at which the learned Subordinate Judge arrived. It is urged on behalf of the plaintiff appellant that the language of the two documents of the 21st of July, 1883, when closely examined, leads to but one conclusion, namely, that there was one transaction between the two ladies and the two Lalas and the transaction was a *bai-bil-wafa*, that is, conditional sale or mortgage. On the other hand, the learned counsel for the respondents has maintained the position his clients took up in the court below. Both parties have cited a number of authorities on the point. In our opinion in a case like the present the case-law cannot be a safe guide unless the language of the documents in all the cases is absolutely the same. Where a court has to find whether a transaction, which is embodied in two separate documents, is one transaction or the two documents express two separate transactions, the language of the documents is, if not the only, at least the important guide in arriving at the right conclusion. If we refer to the language of the documents in suit in the present case, we find that in the sale deed, after the usual recital of the fact of sale and the amount of consideration, the vendors said that they of their own free will and accord absolutely sold the zamindari property together with . . . to Lala Baldeo Sahai and Lala Fakir Chand. The agreement which was executed at the same time by the two Lalas, after reciting the property purchased by them, goes on to say that the property "has been purchased by us, the executants, for Rs. 6,125

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on this condition that whenever within 5 years the vendors shall pay to us the amount of consideration mentioned in this document, we or our heirs shall have no objection in re-conveying the aforesaid share. If we set up any plea the same shall be invalid and the vendors shall be at liberty to take legal steps and to have the property re-conveyed by us. But the condition is that the vendors should not borrow the money, or mortgage or sell the property for payment of the amount due to us. On the contrary, that amount should be the property of them. They shall also have to pay interest on the whole consideration at the rate of 10 annas per cent. per month, out of which the actual produce of the village sold shall be deducted, and they shall have to pay the balance along with the consideration money." Now, in our opinion if the language of the two documents is put together and compared, it leads to the conclusion that the parties to the two documents were entering into one transaction and that transaction was what is called in this country *bai-bil-wafa*, *i.e.*, a conditional sale. The reasons for holding this view are that, though the words "absolute sale" are used in the sale deed yet the agreement distinctly admits that the sale is subject to the condition that the vendors could demand the return of the property on the payment of not only the consideration money but on the payment of consideration money *plus* interest at 10 annas per cent. per month after the accounts between the parties had been taken with regard to the realization of the rents collected by the vendees during their period of possession. Now, if the parties intended to have two separate transactions, *i.e.*, one an out-and-out sale and the other a right given by the vendees to the vendors of getting a re-conveyance within a specified period, there would be no necessity for saying that the sale was subject to reconveyance, or that at the time of reconveyance accounts should be gone into between the parties. The learned counsel for the defendants respondents has urged, and urged very strenuously, that the two documents of the 21st of July, 1883, are really two separate transactions, and in support of his contention he advanced several arguments. He said that the

transaction of *bai-bil-wafa*, or conditional sale, was really a method adopted by the Muhammadans to evade the ecclesiastical law against paying or receiving interest. He referred to the short history of the origin of *bai-bil-wafa* given in the book of Mr. Ghose on Mortgage Law at page 60. In the present case the parties lending the money or purchasing the property were Hindus who were not bound by any ecclesiastical rules of Muhammadan law. There was no occasion for them to have entered into a transaction with the ladies of the nature of a conditional sale. In our opinion there is no force in this argument, for the simple reason that, though the doctrine of *bai-bil-wafa* was introduced into this country by the Muhammadans, yet it seems to have been adopted by other communities also. It really depends upon the inclination or convenience of parties borrowing and lending money as to what means they should adopt of repayment.

There are cases where both creditor and debtor were Hindus and yet the transaction between them was that of *bai-bil-wafa*.

The case-law relied upon by the defendants respondents is as follows :—*Alderson* v. *White* (1), *Bhagwan Sahai* v. *Bhagwan Din* (2), *Ghulam Nabi Khan* v. *Niaz-un-nissa* (3) and *Jhanda Singh* v. *Wahid-ud-din* (4).

The remarks upon which reliance is placed by the learned counsel for the respondents in the case of *Alderson* v. *White* (1) are as follows :—"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." We are quite in agreement with the observations of the learned Lord

(1) (1858) 2 De Gex and J., 97.
(2) (1890) I. L. R., 12 All., 387.
(3) (1910) I. L. R., 33 All., 337.
(4) (1916) I. L. R., 38 All., 570.

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Chancellor; but they do not in any way help the case for the defence. The very first sentence of the observation is that "these deeds taken together do not on the face of them constitute a mortgage." The language of the two deeds in the case of *Alderson* v. *White* (1) was such that it could not be said that the two deeds read together showed a transaction of mortgage. Further on the Lord Chancellor goes on to say "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." It is quite true that in the present case the words "absolute sale" are used in the sale deed, but the terms of the agreement stultify the significance of these words. Under the said terms the parties were at the time of the demand of the vendors for re-conveyance to go through the accounts of the realization of rents by the vendees, and the vendors were to pay 10 annas per cent. per month interest on the sale proceeds, and after casting of the accounts the price for re-conveyance was to be determined. These terms show clearly that the relation of creditor and debtor continued to exist between the two ladies and the two Lalas. No such terms found a place in the deeds produced in the case of *Alderson* v. *White*. (1).

The case of *Bhagwan Sahai* v. *Bhagwan Din* (2) was also on its facts quite different from the present case. The agreement in the case of *Bhagwan Sahai* was as follows:—"However, I have as a matter of favour, mercy, kindness and indulgence, executed this deed, and do hereby stipulate that if all these vendors will within a period of 10 years from the date of this deed pay in a lump sum, and without interest, the whole amount specified above, I shall accept the same and cancel this valid sale . . . *I shall not claim interest from the vendors, nor will they demand profits from me after the expiry of the term.*" The last sentence shows clearly how different the case of *Bhagwan Sahai* v. *Bhagwan Din* (2) was from the case before us. Moreover, in the case of *Bhagwan Sahai* the vendee was extending a favour to the vendor giving the

(1) (1858) 2 De Gex and J., 97. (2) (1890) I. L. R., 12 All., 387.

latter an opportunity to re purchase the property within 10 years on the payment of only the sale price, distinctly stating that the vendor will not be entitled to any account of the rents of the property sold and that the vendee will claim no interest. In the case before us the agreement of the 21st of July, 1883, given by the two Lalas has not been given as a matter of indulgence. On the contrary the agreement is to the effect that the sale is subject to the agreement and the terms contained in the agreement.

The case of *Ghulam Nabi Khan* v. *Nizz-un-nissa* (1) was similar in facts to that of *Bhagwan Sahai*. In the case of *Ghulam Nabi Khan* the sale deed contained the following recital:—"The sale deed 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 the vendor has no right to any share in the property sold." The agreement merely contained a stipulation for repurchase. On comparing the terms of the two documents a Bench of this Court in the case of *Ghulam Nabi Khan* came to the conclusion that the two deeds showed two separate transactions, namely, one of an out-and-out sale and the other of a re-conveyance. The learned Judges made the following remarks which we think pertinent to the argument under consideration :—"Whether a transaction is a *bonâ fide* sale with an agreement for re-purchase, or a 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, we think it must be held that the transaction was intended to be an out-and-out sale with an agreement for repurchase." In our opinion the case of *Ghulam Nabi Khan* was distinctly decided on the facts as found and gathered from the documents of sale and re-conveyance. We have already shown that the language of the two documents was quite different to that of the documents before us.

(1) (1910) I. L. R., 33 All., 337.

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The last case is that of *Jhanda Singh* v. *Wahid-ud-din* (1). In that case there were three documents for consideration before the court. One was a sale deed, dated the 29th of August, 1852; the second was a bond of the same date, and the third was an agreement executed seven days after, on the 5th of September, 1852, undertaking to re-convey the property within a specified period to the vendor on receipt of the sale consideration. The language of the sale deed showed that it was an absolute sale on the face of it. The agreement was executed seven days after, and the language of it showed that the opportunity given to the vendor to repurchase the property was in no way a condition governing the sale but was a matter of indulgence. The relevant words of the agreement were that "the executants are now willing to help and treat with kindness the vendors and of their own free will; they (the executants) covenant in writing that if the vendors after the lapse of 9 or 10 years from the date of the execution of the deed pay the executants the purchase money mentioned in sale the deed, *i.e.*, a sum of Rs. 5,500, out of their own packet without mortgaging or selling this property to other persons, the executants shall forthwith execute a fresh re-sale deed on receipt of this sum." It is thus obvious that the facts in the case of *Jhanda Singh* v. *Wahid-un-din* (1) also were quite different from the facts of the present case. In our opinion the case of *Jhanda Singh* does not bear out the contention for the defence. We would here remark that towards end of their judgment their Lordships of the Privy Council after reciting the rule laid down by the Lord Chancellor in *Alderson* v. *White* (2) say as follows:—"It may not be applicable to the transactions governed by the Muhammadan law. It was apparently held applicable by Sir BARNES PEACOCK, who had vast experience of India and its people, to the case before him." We take it from these observations that the principle laid down by the Lord Chancellor in the case of *Alderson* v. *White* (2) is applicable only where the two documents, namely, one of sale and the other of re-conveyance, show really two separate transactions.

(1) (1916) I. L. R., 38 All., 570. (2) (1858) 2 De Gex and J., 97.

In England where the transaction of *bai-bil-wa'a*, or conditional sale, is not known, and where the drafting of documents is in the hands of trained and skilled men, it is easy to find out whether two or more documents evidenced one or separate transactions. In this country where documents are drawn up by patwaris and petition-writers, they are written in stereotyped phraseology. The word '*katai*,' for example, on which great stress was laid by the defence, (which means 'absolute') is really used by the petition-writers and patwaris who are the usual scribes of such deeds of sale, as a matter of form without understanding what it means. However, in the present case, as we have pointed out, a comparison of the language of the two deeds distinctly shows that the sale was subject to the conditions of the agreement, and the two deeds read together leave no doubt that the transaction of the 21st of July, 1883, entered into between the two ladies and the two Lalas was that of a mortgage.

For these reasons we allow the appeal, set aside the decree of the court below and remand the case to the lower court for trial on the merits as to the remaining issues. As to costs, we allow to the appellant the costs in this Court. The costs in the court below will be costs in the cause.

Appeal allowed and cause remanded.

Before Sir Grimwood Mears, Knight, Chief Justice, and Mr. Justice Muhammad Rafiq.

RAM KUMAR (PLAINTIFF) *v.* MUHAMMAD YAKUB AND ANOTHER (DEFENDANTS). *

1920
March, 26.

Civil Procedure Code (1908), *section* 110—*Appeal to His Majesty in Council—Valuation of appeal—Attempt to raise valuation by adding interest to the amount decreed by the court of first instance.*

A plaintiff claimed a sum which, principal and interest, amounted to more than Rs. 10,000. He obtained in the court of first instance a decree for less than Rs. 10,000 with interest. The defendants, however, appealed to the High Court, and the plaintiff's suit was dismissed. The plaintiff applied for leave to appeal to His Majesty in Council.

Held that the plaintiff could not bring his appeal above the statutory limit by adding to the amount decreed to him by the court of first instance

* Application No 29 of 1919, for leave to appeal to His Majesty in Council.