APPELLATE CIVIL.

Before Sir Louis Stuart, Kt., Chief Judge, and Mr. Justice Wazir Hasan.

1927 *February*, 28.

THAKUR SARFARAZ SINGH (DEFENDANT-APPELLANT) *v.* BALESHWAR PRASAD (PLAINTIFF) AND OTHERS (DEFENDANTS-RESPONDENTS).*

Pre-emption—Execution of a deed of mortgage instead of a deed of sale to avoid pre-emption, whether gives rise to a right of pre-emption.

Per STUART, C.J. :—When a person wishes to raise money by transferring property and is absolutely indifferent as to the manner in which the property is transferred and in order to avoid the exercise of a right of pre-emption executes a mortgage instead of a sale of the property, no right of pre-emption arises even although the same results are obtained by the execution of the deed of mortgage as by a deed of sale. [*Shamshad* Ali *Khan and another* v. *Dharam Singh and others* (1), *Ajudhia and another* v. *Sheo Shankar and others* (2), and *Oudh Behari* v. *Rameshar Singh and another* (3), relied upon.]

If a document on its construction is other than a deed of sale there can be no right of pre-emption.

Per HASAN, J. :—The fact that the mortgage in suit is beset with onerous conditions does not make it none the less a mortgage, and in spite of those conditions the transaction in question is a transaction of mortgage and not of a sale. In a claim for redemption if such conditions have the effect of extinguishing the equity of redemption the court seized with the claim may relieve the mortgagor from those conditions.

Where a contract is of a nature that it is not a completed and an executed contract in law until it is reduced to writing and is registered there is a *locus penitentiæ* until it is reduced to writing. If the *locus penitentiæ* is availed of for fear of a claim for pre-emption and a mortgage is executed instead of a sale no right of pre-emption arises. [*Hanifunnissa* v. *Faizunnisa* (4), *Balbhaddar Prasad* v. *Dhanpat*

* Second Civil Appeal No. 382 of 1926, against the decree of Zia-ud-din Ahmad, Subordinate Judge of Gonda, dated the 30th of July, 1926, setting aside the decree of Sh. Ali Hammad, Munsif of Tarabganj at Gonda, dated the 5th of May, 1926, dismissing the plaintiff's claim.

(1) (1926) 29 O.C., 101. (2) (1927) 4 O.W.N., 137.
(3) (1927) 4 O.W.N., 231. (4) (1911) L.R., 38 I.A., 85.

Dayal (1), *Mahomad Musa* v. *Aghore Kumar Ganguli* (2), and *Maddison* v. *Alderson* (3), referred to.]

Mr. *Hyder Husain*, for the appellant.

Messrs. *Ram Bharosey Lal* and *Mahabir Prasad*, for the respondents.

1927

THAKUR SARFARAZ SINGH v. BALESHWAR PRASAD.

1927 *February*, 23.

STUART, C. J. :—The principles governing the decision of this appeal have been laid down on several occasions within the last few months. On the 21st of November, 1925 the present Bench decided First Civil Appeal *Shamshad Ali Khan and another* v. *Dharam Singh and others* (4), in which the principle was accepted that when a man wishes to raise money by transferring property and is absolutely indifferent as to the manner in which the property is transferred and in order to avoid the exercise of a right of pre-emption executes a mortgage instead of a sale of the property, no right of pre-emption arises even although the same results are obtained by the execution of the deed of mortgage as by a deed of sale. On the 22nd of December, 1926 a similar decision was arrived at in *Ajudhia and another* v. *Sheo Shankar and others* (5), and on the 10th of January, 1927 a similar principle was accepted in Second Civil Appeal No. 41 of 1926, *Oudh Behari* v. *Rameshar Singh and another* (6). I again state, as I have stated before, that to my mind the proper method to decide a case of this kind is on the construction of the document; and if the document on its construction is other than a deed of sale there can be no right of pre-emption. Here the document is undoubtedly not a deed of sale; it is a deed of mortgage, and in these circumstances no right of pre-emption can exist. I would, therefore, allow this appeal and would direct that the suit of the plaintiffs Baleshwar Prasad should stand dismissed

Stuart, C. J.

(1) (1924) 27 O.C., 4.
(2) (1915) L.R., 42 I.A., 1.
(3) 8 App. Cas., 467.
(4) (1926) 29 O.C., 101.
(5) (1927) 4 O.W.N., 137.
(6) (1927) 4 O.W.N., 231.

1927

THAKUR SARFARAZ SINGH v. BALESHWAR PRASAD.

1927 *February*, 28.

and that Baleshwar Prasad should pay his own costs and those of Sarfaraz Singh in all courts.

HASAN, J. :—This is the appeal by Sarfaraz Singh (defendant No. 1) from the decree of the Subordinate Judge of Gonda, dated the 30th of July, 1926, reversing the decree of the Munsif of Tarabganj, dated the 5th of May, 1926.

Hasan, J.

The appeal arises out of a claim for pre-emption in respect of a transaction, dated the 14th of October, 1925. The court of first instance dismissed the claim on the ground that the transaction evidenced by the deed of the 14th of October, 1925 was one of mortgage and not of sale. The lower appellate court has come to the conclusion that it is a sale and has consequently decreed the suit for pre-emption.

Ex facie the deed of the 14th of October, 1925 is a deed of mortgage and therefore the claim for pre-emption in respect of it is *primâ facie* untenable. The lower appellate court has, however, based its decision to the contrary on two grounds :—(1) That the terms of the mortgage are so onerous and unconscionable in their nature that the exercise of the right of redemption in respect of that mortgage would be both unreasonable and impracticable; and (2) that parole testimony proves that prior to the endorsement of the terms of the contract between the parties on the deed in question a contract for sale was agreed upon.

I am of opinion that both the grounds of decision are erroneous. As to the first ground, I have no hesitation in holding that on a proper construction of the deed of the 14th of October, 1925 it is a deed of mortgage, and as between the parties it is conclusive evidence of a transaction of mortgage. The learned pleader for the respondents cited the decision of their Lordships of the Judicial Committee in the case of

Hanifunnisa v. *Faizunnisa* (1) for the purpose of showing that it was open to the parties to the transaction to show by extrinsic evidence that the deed in question was intended to be a deed of sale.

To my mind this is not the effect of the decision cited. The deed in question in that case purported to be one of sale of the property in suit in favour of three children of the vendor. Subsequently the vendor brought the suit, out of which the appeal before their Lordships of the Judicial Committee had arisen, for a declaration that the deed was of no effect against the vendor and for possession. In the alternative a prayer was made for payment of the price. The defence was that the price mentioned in the deed of sale as consideration for the transfer was fictitiously mentioned and that the transaction in its true nature was a transaction of gift. The High Court held that the defendants were precluded by section 92 of the Indian Evidence Act from giving parole evidence for the purpose of showing that the deed of sale was a deed of gift, in other words, the decision of the High Court amounted to this that the defendants were precluded from showing that a transaction which on the face of it was for consideration was in reality without consideration. This decision was reversed by their Lordships of the Privy Council in a short judgment by merely observing that the decree appealed from could not be sustained.

There can be no doubt that section 92 of the Indian Evidence Act, 1872, permits a party to a contract to prove by extrinsic evidence the absence of consideration where consideration is set forth in the written instrument. The fact that the mortgage of the 14th of October, 1925 is beset with onerous conditions does not make it none the less a mortgage. In a claim for

(1) (1911) L.R., 38 I.A., 85.

1927

THAKUR SARFARAZ SINGH v. BALESHWAR PRASAD.

redemption if such conditions have the effect of extinguishing the equity of redemption the court seized with the claim may relieve the mortgagor from those conditions as was done in the case of *Balbhaddar Prasad v. Dhanpat Dayal* (1). This, however, is not the proper opportunity to express any opinion on that view of the case. The fact remains that in spite of those conditions the transaction in question is a transaction of mortgage and not of sale.

Hasan, J.

As to the second ground of decision of the lower appellate court, the contract of the nature under consideration is not a completed and an executed contract in law until it is reduced to writing and is registered, and thus there was *locus penitentiæ* till it was reduced to writing. In support of this view of law I would quote the observations of Lord SHAW in the case of *Mahomad Musa* v. *Aghore Kumar Ganguli* (2):— "To use language common from very early times in Scotland, and highly approved in the case of *Maddison* v. *Alderson* (3) in the House of Lords, it is no doubt true that there is a *locus penitentiæ*, that is 'a power of resiling from an incomplete engagement, from an unaccepted offer, from a mutual contract to which all have not assented, from an obligation to which writing is requisite, and has not yet been adhibited in an authentic shape.' This is the situation where the parties stand upon nothing but an engagement which is not final or complete."

The evidence which has been accepted by the learned Subordinate Judge shows that the *locus penitentiæ* was availed of in the present case for fear of a claim for pre-emption. I therefore agree in the order which the Honourable the CHIEF JUDGE proposes to pass in this appeal.

(1) (1924) 27 O.C., 4. (2) (1915) L.R., 42 I.A., 1.
(3) 8 App. Cas., 467.

1927

THAKUR SARFARAZ SINGH v. BALESHWAR PRASAD.

BY THE COURT (STUART, C. J., and HASAN, J.)— We allow this appeal and direct that the suit of the plaintiff Baleshwar Prasad stand dismissed and that Baleshwar Prasad should pay his own costs and those of Sarfaraz Singh in all courts.

Appeal allowed.

APPELLATE CIVIL.

Before Sir Louis Stuart, Kt., Chief Judge, and Mr. Justice Wazir Hasan.

1927 *February*, 28.

KAMTA SIROMAN PRASAD SINGH (DEFENDANT-APPELLANT) v. RAM SWARUP AND OTHERS (PLAINTIFFS RESPONDENTS.)*

Oudh Rent Act (XIX of 1868), sections 125 and 126—Oudh Land Revenue Act (XVII of 1876), sections 132 and 133—Sale of pukhtadari *land in satisfaction of a decree for arrears of rent under section 125, Oudh Rent Act (XIX of 1868)—*Birtdari *tenure, whether an "incumbrance", "grant" or "contract" within section 133, Oudh Land Revenue Act (XVII of 1876), and whether it ceases to exist on a sale under that section—Consequences of sales under section 125, Oudh Rent Act (XIX of 1868), and section 133, Oudh Land Revenue Act (XVII of 1876).*

The plaintiffs held *birtdari*, i.e., under-proprietary or *pukhtadari*, rights in the plots in suit under the decrees of the Settlement Court. In 1880 the Deputy Commissioner sold the *pukhtadari* tenure in satisfaction of the arrears of rent due from the *pukhtadars* to the superior proprietor according to the provisions of the ultimate clause of section 125 of the Oudh Rent Act (XIX of 1868). Under that section he had the same powers to sell as he had under section 132 of the Land Revenue Act (XVII of 1876). The Deputy Commissioner also purported to cancel and did in fact cancel even the subordinate interest of the *birtdars* in the land in suit. The plaintiffs, however, remained all along in possession of the plots in suit. In a suit for declaration that the plaintiffs are under-proprietors of the plots in suit the question arose

* Second Civil Appeal No. 295 of 1926, against the decree of E. M. Nanavutty, District Judge of Fyzabad, dated the 29th of April, 1925.