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cutor by English law has a full legal title to the assets and power to pass that title, a Court of Equity will, if the occasion call for it, restrain him from the full exercise of that power.

Attorneys for the plaintiff: Messrs. *Dhur* and *Mitter*.

Attorneys for the defendants: Baboo *P. C. Bonnerjee* and Messrs. *Gray* and *Sen*.

[PRIVY COUNCIL.]

P. C.* 1871 *Jan.* 20.

PATTABHIRAMIER (DEFENDANT) *v.* VENKATAROW NAICKEN AND NARASIJHA NAICKEN (PLAINTIFFS).

ON APPEAL FROM THE LATE SUDDER DEWANNY ADAWLUT AT MADRAS.

Mortgage. Madras Law of—Right to redeem—Regulation XVII of 1806—*False Deed in support of True Claim.*

See also 3 B.L.R. 206. B.L.R. 312.

In a suit instituted in 1853 to redeem a mortgage containing a clause making it an absolute sale in default of redemption by a certain date,—*Held*, that in the Madras Presidency, effect must be given to that clause, the Regulation XVII of 1806 not being applicable.

A party is not precluded from succeeding upon a title established by a genuine deed, because he sets up a false deed which, if treated as a conveyance and not as a mere confirmation, may be inconsistent with that title.

THIS suit was brought on the 17th November 1853, by the respondents against the appellant and others to recover from them certain property in Talook Namiclam which had been originally mortgaged by the respondents' ancestors on the 13th June 1808 to the appellant's ancestors, and which the respondents alleged had been held by way of usufructuary mortgage, and was therefore still redeemable under the peculiar wording of the mortgage.

The defence was that there had been a sale of the property to the appellant.

*Present:—THE RIGHT HON'BLE LORD CHELMSFORD, SIR JAMES W. COLVILE, LORD JUSTICE MELLISH, AND SIR LAWRENCE PEEL.

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It is unnecessary to give the facts in detail, as the effect of the findings on fact was that the mortgage of June 1808 was the only document affecting the position of he appellant and respondents.

This document was as follows:—

"I have mortgaged to you the two karais of land belonging to me out of the nine karais in the village of Kattalam in Kattala Vattam of Tirimarugal Maganam attached to the Terkuvettem of Mayavaram, together with the Nattam, pond, house, ground and all other appurtenances, and borrowed of you the sum of current Scott pagodas 350. As I have received this sum from you in cash, you may enjoy the said two karais and other appurtenances with all profits and losses for five years, from this year up to Angirasa (1812 or 1813), and pay the Government tax &c. I shall repay to you the said principal, and redeem the land on or before the 30th Vaiyasi of Sriumkha (10th June 1813), and in default you and your posterity may enjoy the said two karais of land, &c., as if this is an absolute sale with the right of alienating the same by gift sale, &c. If any dispute arises regarding this, I shall come forward and settle the same."

The District Moonsiff held that the condition of forfeiture was inconsistent with the defence set up of a subsequent purchase, and that it could not be enforced.

The Principal Sudder Ameen held that the condition of forfeiture was binding, and that the mortgagors' lost their interest in the property under that clause.

The Sudder Court gave the following judgment:—

"It is contended on the part of the third defendant that the land mortgaged lapsed to the first defendant's ancestor in 1813, when the period for redemption expired, and that the plaintiffs are debarred from disputing the title as thus acquired by the Statute of Limitation.

"The Court cannot assent to this doctrine. They observe, in the first place, that the plea is inconsistent with another allegation made on the part of the defence,—namely that the land was acquired by purchase in 1816. The sum of the mortgage was Rs. 1,050, and that of the alleged purchase Rs. 3,266-10-8. Had the land lapsed to the first defendant's ancestor in 1813, it is clear that there would have been no occasion for the alleged

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purchase three years afterwards, and at a sum three times the amount of the mortgage. It is true that the allegation of the purchase has been discredited by the lower Courts; but having been made, the same party is not at liberty now to fall back upon another plea inconsistent with his original statement and set up a title as having been acquired at a prior period by lapse.

"The Court, therefore, hold that the penalty attached to the mortgage bond was not enforced in 1813, and they find upon the record no evidence, or even plea, that it was enforced at any subsequent period. A penalty of this nature the Court do not give effect to, and therefore the plaintiffs' right to redeem has remained to them. As respects the operation of the Statute of Limitation, it is to be observe that the statute would only run against the plaintiffs from the time that they might have tendered the sum of the mortgage, and that the defendant might have refused to accept it and make over the land. It is not alleged that any such tender or refusal has occurred.

"The Court resolve, therefore, to set aside the decree of the Principal Sudder Ameen, and to affirm that of the District Moonsiff."

The amount in dispute being under Rs. 10,000, the appellant, on the ground of the great importance of the decision, obtained from Her Majesty in Council in April 1861 special leave to appeal. Unexplained delay took place in prosecuting the appeal which now came on for hearing *ex parte*.

Sir *R Palmer*, Q. C., and Mr. *Leith* for the appellant.

The terms of the deed ought to be regarded, and the clause for forfeiture given effect to in the absence of any specific law to to the contrary. Colebrooke's Digest, Volume 1 (1). The Regulation XVII of 1806 does not apply to Madras, so that the right of the mortgagee became absolute at the time fixed by the deed—*Surreefoonnissa* v. *Sheik Enayet Hossein* (2); *Forbes* v. *Ameeroonnissa Begum* (3). The law of limitation applies under the Madras Regulation of limitation (4).

(1) Pages 183, 187, 188, and 193.
(2) 5 W. R., 88.
(3) 10 Moor's I. A., 340.
(4) Reg. V. of 1827, sec. 8, cl. and sec. 1, cl. 1.

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Their LORDSHIPS, having taken time to consider, delivered the following judgment:—

In this case the appellant claims to be the absolute owner of the lands in question under several conveyances from the first and second of his co-defendants in the suit, or from as whom they represent. That the title of his vendors or their ancestor was originally a mortgage title is undisputed: and the suit out of which the appeal has arisen was brought, in October 1853, by the representaves of the mortgagor to redeem the property, alleging it to be still redeemable. The decision of the Court of first instance was in their favor, but that was reversed by the Principal Sudder Ameen of Combaconum, who decreed in favour of the appellant. His decree was reversed by the late Sudder Dewanny Adawlut of Madras on special appeal; and the present appeal is against the decree of that Court.

The Sudder Court, having no jurisdiction to determine on special appeal any question of fact, and there being no cross-appeal to Her Majesty in Council against the decree of the Principal Sudder Ameen, their Lordships must accept his findings on the facts as conclusive.

Those findings were:—

1st. That the original contract between the mortgagor and the mortgagee was contained in the deed of conditional sale, dated the 13th of June 1808, which is in the record, and is there called Exhibit No. 1 (1); and that the plaintiffs had failed to establish that there was any other instrument of mortgage.

2nd. That Exhibit No. 2, purporting to have been executed on the 16th of June 1816, upon which the appellant had relied either as a confirmation of the then absolute title of his vendors, or as a conveyance or release of the right of redemption to them, was not a genuine document.

3rd. That certain letters, put in by the plaintiffs in order to prove acknowledgments by the mortgagees that the mortgage was a subsisting and redeemable mortgage as late as 1851, were also forgeries.

The conclusion of law which the Principal Sudder Ameen

(1) See this set out, *supra*, p. 137.

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drew from his first finding was, that under Exhibit No. 1 the title of the mortgagees became absolute on the 10th of June 1813, by reason of the failure of the mortgagor to redeem at that date; and the special appeal was admitted to try the correctness of that conclusion. Hence, the sole question for their Lordships' determination is whether, under the law of the Madras Presidency, the interest of a mortgagee under a deed of conditional sale does or does not become absolute, according to the terms of the contract, by the mere failure of the mortgagor to redeem at or before the time specified in the deed.

This form of security being common in India, the question is of very general importance, and on that ground the appellant obtained Her Majesty's special leave to present this appeal, which after considerable delay, has unfortunately, come on to be heard *ex parte*.

The contract embodied in Exhibit No. 1 was, that the mortgagee should hold possession of the land for five years, paying the Government revenue; that the mortgagor should repay the principal and redeem the land on the 10th of June 1813; and that, in default, the mortgagee and his posterity should enjoy the land as if the transaction were an absolute sale, with the right of alienating the same by gift, sale, &c.

The transaction then was one of mortgage by bye-bil-wafa or kut-kabala usufructuary; the usufruct of the property to be taken in lieu of interest. And the first question that suggests itself is, was there any rule of law to prevent the Court from giving effect to such a contract according to the intent and meaning of the parties plainly expressed by its language?

That this form of security has long been common in India is notorious. The fact is stated in the preamble to the Bengal Regulation No. 1 of 1798. That such contracts were recognized and enforced according to their letter by the ancient Hindu law appears from several passages in Colebrook's Digest (Volume 1, pages 183, 187, 188, and 193). That they were equally recognized and enforced between Mahomedans is shown by Mr. Baillie in his Introduction to his learned work on the Mahommedan Law of Sale. If the ancient law of the country has been modified by any later rule, having the force of law

that rule must be founded either on positive legislation or on established practice.

Nothing concerning such contracts is, so far as their Lordships are informed, to be found in the Statute Law relating to the Presidency of Madras except Regulation XXXIV of 1802. The 8th and 9th sections of that Regulation extended to Madras the provisions of the 10th and 11th sections of the Bengal, Regulation No. XV of 1793. Both these Regulations were passed with the object of fixing the legal rate of interest, and of preventing the taking of interest in excess of it; and both have since been wholly or in great part repealed, with other usury laws, by Act XXVIII of 1855. The clauses in question affected only that part of the contract now under consideration which related to the usufruct of the property. As to that they may have made it necessary, contrary to the intention of the parties, to take upon a redemption an account of the rents and profit as between mortgagor and mortgagee in possession, compelling the latter to set what he might have received in excess of legal interest against the principal; but they neither extended the time of redemption nor imposed upon the mortgagee, when the mortgagor had failed to redeem within the stipulated period, the obligation of taking any judicial or other proceedings in order to make his title absolute.

In Bengal there was further legislation. In that Presidency a Regulation (No. XVII of 1806) was passed which allowed a mortgagor, who had executed such a security as that now in question, to redeem at any time before the mortgagee had finally foreclosed the mortgage by taking the proceedings which the Regulation made essential to foreclosure.

It is, however, unnecessary to observe that this Bengal Regulation had of itself no force in the Presidency of Madras. And their Lordships cannot find, either in the Madras Regulations or in the Acts of the Indian Legislature subsequent to the Charter Act of 1834, any statute by which similar provisions have been enacted for Madras.

That, in cases to which Regulation XVII of 1806 does not apply, the interest of a mortgagee under a deed of conditional sale becomes absolute according to the terms of the contract by

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the mere failure of the mortgagor to redeem within the stipulated period has recently been decided by a Full Bench of the High Court of Bengal, in the case of *Surreefoonnissa* v. *Sheik Enayet Hossein* (2). In that case the mortgage bore date the 30th of November 1801; the mortgage was made payable on the 28th of September 1806. The mortgagor sued for redemption, and the mortgagee admitted that there had been no foreclosure pursuant to the Regulation. The High Court, however, ruled that, if the Regulation did dot apply, the interest of the mortgagee became absolute on the 28th of September 1806, and, finding that the Regulation had not been promulgated, and therefore had not become operative in the district until the 7th of January 1807, dismissed the plaintiff's suit. The point, so decided, is also assumed to be law in the judgment delivered at this Board in the case of *Forbes* v. *Ameeroonnissa Begum* (3), and unless it be law it is difficult to see why the Regulation of 1806 was passed.

Their Lordships have been unable to discover that there has been any course of decisions in the Court of Madras which can be set against the authority just cited. The utmost that can be gathered from this record is that some uncertainty concerning the operation of these contracts may have crept into the lower Courts of Madras. If the Principal Sudder Ameen was right in thinking that this afforded a reason why the appellant had sought to strengthen his title by the production of the false deed No. 2, it is to be observed that the plaintiffs, on the other hand, showed their sense of the uncertainty of the law by setting up the false case that another form of mortgage had finally been substituted for the deed of conditional sale. Moreover, the Sudder Court does not rest its judgment upon decided cases. The first reason advanced in support of that judgment is clearly untenable. That a party is precluded from relying upon a title established by a deed conclusively found to be genuine, because he has foolishly and wickedly set up a false deed which, if treated as a conveyance and not as a mere confirmation, may be inconsistent with that title, is a proposition for which there is

(2) 5 W. R., 86. (3) 10 Moore's I. A., 348

no foundation either in reason or in law. Nor does the second reason assigned for the Judgment appear to their Lordships to be better founded. It assumes that an obligation lay on the mortgagee to do some act by way of enforcing what is not very correctly termed the penalty; and that there could be no adverse possession against the mortgagor until there had been a tender and refusal of the mortgage money. But this assumption implies that in some way or another the rights and obligations of the parties as defined by the contract had been qualified by a known rule of law. Their Lordships had already stated that so far as they can discover, no such qualifications have been introduced, as in Bengal, by any act of legislation into the statute law applicable to Madras. What is known in the law of England as "the equity of redemption" depends on the doctrine established by Courts of Equity that the time stipulated in the mortgage deed is not of the essence, of the contract. Such a doctrine was unknown to the ancient law of India; and if it could have been introduced by the decisions of the Courts of the East Indian Company, their Lordships can find no such course of decision. In fact, the weight of authority seems to be the other way. It must not, then, be supposed that in allowing this appeal their Lordships design to disturb any rule of property established by judicial decision so as to form part of the law of the forum, wherever such may prevail, or to affect any title founded thereon.

Their Lordships therefore being of opinion that the decree under appeal is erroneous and ought to be reversed, and that the special appeal to the Sudder Court ought to have been dismissed with costs, will advise Her Majesty accordingly. But considering the great and unexplained delay which has taken place in the prosecution of this appeal, they do not think that they ought to give the appellant the costs of it.

Appeal allowed.

Agents for appellants: Messrs. *Burton, Yeates,* and *Hart.*