PRIVY COUNCIL.

P. C.*
1873
June 27.

GOKULDOSS AND ANOTHER (DEFENDANTS), *v.* KRIPARAM AND OTHERS (PLAINTIFFS).

[On appeal from the Court of the Judicial Commissioner, Central Provinces, India.]

Mortgage—Bai-bil-wafa—Construction—Foreclosure in the Central Provinces—Proprietorship—Settlement—Res Judicata.

By a bond dated 10th February 1857, a certain village was mortgaged by one *G* to the appellants and their father as security for a loan; the bond providing that, "if I fail to pay the money as stipulated, I and my heirs shall without objection cause the settlement of the said village to be made with you." The interest of *G* in the village was described as that of a *malguzar*, and his proprietary right therein was declared by the Revenue Authorities shortly after the execution of the mortgage, but his payments of Revenue being in arrear, the Board of Revenue granted a lease of the village for ten years to the appellants' father. The mortgagees in a suit on the bond obtained the following decree on 3rd November 1860:—"As the defendant acknowledges the plaintiffs' claim, it is ordered that a decree be given to the plaintiffs for principal and interest and costs against the defendant and the mortgaged property." In proceedings in the Civil Court taken under this decree, the mortgagees asked for possession of the village, and obtained, on 17th July 1862, an order in pursuance of which they were put in possession, an appeal by *G* being rejected. *G* took various steps to recover possession of the mortgaged property, or a declaration of his proprietary interest therein, but failed in his endeavours; an application for a grant of the proprietary right in the village, and an appeal from an order cancelling his potta, being rejected by the Revenue Authorities on 8th December 1864, and 27th July 1865 respectively; and on 12th August 1867 *G* conveyed the village by deed of sale to the respondents. In a suit brought by them to redeem the mortgage and obtain possession of the property.

Held the suit was not barred by the order of the Civil Court of 17th July 1862, nor had the orders of the Revenue Officers of 8th December 1864 and 27th July 1865 effected such a transfer of any right which *G* might have had to the appellants, as to render the sale to the respondents invalid.

Held also that the effect of the bond was to create a simple mortgage, and not a conditional deed of sale; and that the proceedings taken under the decree of 3rd November 1860, and the order made therein of 17th July 1862, by virtue of which the mortgagees obtained possession of the mortgaged property, did not operate so as to extinguish the right of redemption,

* *Present*:—SIR J. W. COLVILE, SIR B. PEACOCK, SIR M. E. SMITH SIR R. P. COLLIER, AND SIR L. PEEL.

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The rule that a *bai-bil-wafa* does not become absolute upon breach of the condition as to payment, without proceedings for foreclosure, obtains in the Central Provinces of India.

Pattabhiramier v. *Vencatarow Naicken* (1) distinguished.

APPEAL from a decision of the Judicial Commissioner of the Central Provinces, dated 1st July 1871, reversing a decision of the Commissioner, dated 14th April 1871 and affirming the original decision in the case passed by the Deputy Commissioner on the 16th February 1871.

The suit was brought by the respondents for redemption of a mortgage, and for possession, of a certain village which had been conveyed to them by deed of sale dated 12th August 1867, executed in their favor by one Gujraj Singh. The facts were as follows:—On 10th February 1857 Gujraj Singh mortgaged the village in suit to the appellants and their father (since deceased) to secure a loan of Rs. 1,049-8: the mortgage-bond containing the following provision:—"As security for the above loan I mortgage the village of Gobra on this condition; that if I fail to pay the money as stipulated, I and my heirs shall without objection cause the settlement of the said village of Gobra to be made with you." The interest of Gujraj in the village was described in the bond as that of a *malguzar*, and he was shortly after the execution of the mortgage declared by the Revenue Authorities to have the proprietary interest in the subject of the mortgage; but his payments to the Board of Revenue having fallen into arrears, a lease of the village for ten years was granted to the father of the appellants. On 3rd November 1860 the appellants, in a suit brought by them on the bond, obtained the following decree in the Court of the Sudder Ameen of Jubbulpore:—"As the defendant acknowledges plaintiffs' claim, it is therefore ordered that decree be given to the plaintiffs for principal and interest and costs against the defendant and the mortgaged property." After allowing some time to elapse, the appellants in proceedings taken under this decree prayed that they might be put into possession of the mortgaged property; and in pursuance of an order of the Deputy Commissioner, dated 17th July 1862, in which he expressed an opinion that the village was "distinctly mort-

1) 7 B. L. R., 136; S. C., 13 Moore's I. A., 560.

gaged and pledged," they obtained possession thereof; an appeal brought by Gujraj from the decision being on 3rd March 1863 rejected by the Judicial Commissioner. Various steps were taken by Gujraj Singh to recover possession of the mortgaged property, or to obtain a declaration of his proprietary right therein; but his endeavours were unsuccessful. These steps shortly were, an application to the Revenue Board, pending the appeal in the suit on the bond, that the village should be restored to him, which was rejected; an application in 1864 to the Settlement Department for a grant of the proprietary right in the village which application was refused on 8th December 1864 and the mortgagor's potta was cancelled, on the ground the village had been sold to the appellants under the decree of the Civil Courts, and a potta granted to the appellants, an appeal from that decision by Gujraj being rejected by the Settlement Officer on 27th July 1865; and lastly a petition in 1857 to the Civil Court on the expiration of the ten years' lease to the appellants' father, for a release to him on his satisfying the mortgage debt, which was also rejected. Gujraj shortly afterwards executed the deed of sale under which the respondents claimed the property.

On 6th October 1867 the respondents brought the present suit in the Court of the Deputy Commissioner of Jubbulpore to redeem the mortgage and recover possession of the village. The appellants pleaded that the mortgage had become foreclosed, to which the respondents answered that the alleged order of foreclosure was made in execution, and not in the original suit. The suit was dismissed by the Deputy Commissioner on the ground that the question at issue had been decided in proceedings to which Gujraj Singh had been a party. The Commissioner confirmed this order, but the Judicial Commissioner remanded the case for trial on its merits to the Commissioner, and subsequently to the Deputy Commissioner, who, on the 16th February 1871, held that the possession ordered to be given by the decree of 3rd November 1860 meant a possession until the mortgage debt was liquidated, and not a permanent possession of full proprietorship. On the 14th April 1871 the Commissioner reversed this decision, but on the (1st July 1871), the Judicial Commissioner restored the decisiones of the Deputy

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Commissioner holding that the decree of the 3rd November 1860 did not warrant a permanent transfer of the property to the appellants, and that under the order of 17th July 1862 no such transfer had been made. He, however, granted a certificate under s. 1, Act II of 1863, that the case was a fit one for appeal to Her Majesty in Council.

Mr. *Forsyth*, Q.C., and Mr. *Stallard*, for the appellants, contended that the suit was barred as being *res judicata*; that it was barred by the orders of the Settlement Department, dated 8th December 1864 and 27th July 1865; and that on the evidence the possession given under the execution proceedings was a permanent snd absolute possession, and the respondents took nothing by their purchase from the mortgagor.

As to the mortgage deed the learned Counsel contended that, according to its true construction, it amounted to a *bai-bil-wafa*, and that the appellant's interest under it had become absolute without the necessity of foreclosure proceedings; see *Pattabhiramier* v. *Vancatarow Naicken* (1).

The respondents did not appear.

The judgment of their LORDSHIPS was as follows :—

This is an appeal from the Central Provinces of India; and the question is whether the decree of the Judicial Commissioner of those Provinces was right in holding that the respondents were entitled to redeem a certain village, in which the appellants contended that, though they were originally mortgagees, they had acquired an absolute interest. The nature of the property is some what peculiar. On the face of the mortgage, the mortgagor, one Gujraj, is described as *malguzar* of the village, and, it appears, that, previous to and at the date of the instrument, the interest of a *malguzar* was not exactly that of proprietor. Five days, however, after the execution of the mortgage,—that is to say, on the 15th February 1857, the law having been modified, Gujraj was declared, by the Revenue Authorities, to have the proprietary interest, and we must, there-

(1) 7. B. L. R., 136; 13 Moore's I. A., 560

fore assume that his interest in the village was capable of being disposed of either by mortgage or sale. The title of the respondents is founded on a deed of sale executed by Gujraj, on the 12th August 1867, and having thus acquired whatever interest then remained in him, they brought the present suit to redeem the mortgage; and the only substantial question between the parties is, whether, by reason of the proceedings which are about to be reviewed, the appellants had acquired the absolute interest in the property, so that at the date of the sale to the respondents there was no right of redemption capable of passing from Gujraj to them.

Their Lordships think it will be convenient, before they consider this question on its merits, to dispose of two preliminary points, in the nature of issues in bar of the suit which were raised in the Courts below, but have not been pressed very strongly here at the bar. The first was in the nature of a plea of *res judicata*, being in effect that, in the course of the miscellaneous proceedings had in execution of the decree of the 3rd of November 1860, there had been such an adjudication upon the rights of the parties, that under s. 2 of Act VIII of 1859 the present suit was not cognizable by the Court. This was decided in the first instance in favor of the appellants, but the decision of the Officiating Deputy Commissioner, although affirmed by the Commissioner, was, on special appeal, reversed, and in their Lordships' judgment correctly reversed, by the Judicial Commissioner. They entirely concur with the last-named officer in the opinion that the present cause of action *viz.*, the right to redeem, was not heard and determined in the course of the proceedings in question; and, consequently, that whatever may be the effect of the latter, they did not constitute a bar to the hearing of the present suit within the meaning of the 2nd section of Act VIII of 1859.

The other point raised was in effect that a settlement of the village made by the Revenue Officers with the father of the appellants had so taken the proprietorship of the village out of Gujraj and vested it in the other party, as to make the sale by the former to the respondents utterly invalid. This point, after repeated remands and appeals, was ultimately disposed of in

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favor of the respondents, and, as their Lordships think was, correctly decided in their favor. It is unnecessary to go at any length into the consideration of this question, because one of the Judges, a Mr. Grant, who seems to have had considerable experience as a Settlement Officer, and whose decision was generally in favor of the appellants, fairly admitted not only that it had been conclusively disposed of by the Judicial Commissioner, but that the settlement proceeding, in his opinion, could have afforded no bar to the suit, inasmuch as the Settlement Officers have no power to determine questions of title. Therefore that point may also be treated as out of the present appeal.

Upon the merits the first question to be considered is what was the effect, and what the true construction of the instrument of mortgage? It has been treated by several of the Judges in the Courts below as a *bai-bil-wafa*, or deed of conditional sale, and that is the construction which the learned Counsel at the bar have to-day put upon it. Their Lordships, however, are by no means satisfied that it is a security of that character. The word "sale" is never used throughout the instrument. The security is described in terms as a mortgage of the village of Gobra, and the only passage from which any inference that it was in the nature of a deed of conditional sale can be drawn is the final sentence, "that if I fail to pay the money as stipulated, I and my heirs shall without objection cause the settlement of the said village of Gobra to be made with you." Now, upon that it is to be observed that when the deed was executed the consent of the Revenue Officers would have been required in order to carry out such a stipulation; that the proprietary right of the mortgagor had not then been declared in the terms in which it was afterwards declared; and that, supposing it had been so declared, the instrument would not, like an ordinary deed of conditional sale, have imported in terms a sale of the interest of the party which was to become absolute and conclusive upon his failure to pay the stipulated sum at a certain date. Such a contract would, independently of any rule of law to the contrary, execute itself, and the remedy of the party upon it would, if he were out of possession, be a suit for possession,

Their Lordships, therefore, in construing this instrument, incline to the opinion that the effect of the document was to create a simple mortgage hypothecating the right of the party in the village of Gobra, and that the deed was not meant to operate by way of conditional sale. That this was the construction originally put upon the instrument by the mortgagees themselves seems to their Lordships perfectly clear from the first proceeding which they took to enforce it. They brought a suit for the recovery of the mortgage debt, and obtained a decree for the satisfaction of the amount decreed either by the defendant himself or out of the mortgaged property. That is the only construction which their Lordships can put upon the decree of 3rd November 1860. The decree, however, was not executed in that way. After two years' delay, the mortgagees applied for execution of their decree, but in a different way. After stating that the money had not been paid according to the decree, they say the enforcement of the condition of the bond is now just, and therefore they pray that the full possession of the village may be given to them in perpetuity, and the defendant be released from liability under the decree. These proceedings differ entirely from those which would have been had by parties entitled under a deed of conditional sale to an absolute interest. If the law did not impose upon them the necessity of taking proceedings for foreclosure, they would have brought their suit for the possession of the estate. If the law required them to take proceedings for foreclosure, they would have taken such proceedings, and after forclosure would have sued for possession; or possibly, having regard to the nature of the property and the terms of instrument, they might have sued to compel a specific performance of the undertaking of the mortgagor to cause a settlement of the village to be made with them. But they certainly would not have sued for the mortgage debt, or taken a decree in the form of that of the 3rd of November 1860.

It is, however, argued that the substantial effect of the proceedings, taken in execution of this decree, was to destroy any right of redemption which may previously have existed. It is not necessary to go in detail through those voluminous

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proceedings. Their Lordships are not prepared to say that it was not the intention of the mortgagees to obtain, or even of the authorities who executed the decree to make, by means of those proceedings, such a permanent transfer as would extinguish to the mortgagors of the village the right of redemption. But their Lordships fully concur with the Judicial Commissioner in the conclusion that the decree did not warrant such a permanent transfer to the respondents; and that the Courts, in executing the decree, did not, and could not effectually make such a transfer. If the construction which they are disposed to put upon the instrument is correct, if the security was in the nature of a simple mortgage, the proper course for the mortgagees to pursue was to raise the amount for which they had obtained a decree by the sale of the village, paying the surplus proceeds, if any, to the mortgagor. They could not make such a decree the foundation of a transfer which should destroy the right of redemption, supposing the right of redemption existed. Again, assuming that Mr. Forsyth's construction of the instrument is the correct one, and that it is to be treated as a *bai-bil-wafa*, their Lordships would have equal difficulty in saying that the interest under that *bai-bil-wafa* has become absolute, as Mr. Forsyth contends it has. The argument, indeed, involved this proposition, that inasmuch as the Bengal Regulations have not been introduced generally into the Central Provinces, a conditional sale must be taken to become absolute on the failure of the mortgagor to pay the mortgage debt on the day fixed, and that the mortgagee is under no obligation to take any proceedings by way of foreclosure. In support of that proposition Mr. Forsyth relied upon the decision of this Board in the case of *Pattabhiaramier* v. *Vencatrow Naicken* (1). If this contention were correct, it would be unnecessary to consider whether the proceedings actually taken had the effect of destroying the equity of redemption, since after the day fixed for the payment of the mortgage money, the interest of the mortgagees had *ipso facto* become absolute, and there was no such equity to destroy. It has already been observed that in such a case their proper

(1) 7 B. L. R., 136; S. C., 13 Moore's I. A. 560.

remedy was a suit for possession, and not such a suit as that which they actually brought. But their Lordships have also to observe, that the case cited by no means laid down broadly that out of the Regulation Provinces of Bengal—those provinces to which the Bengal Regulation law strictly and in all its fulness applies—the rule laid down was to be adopted. it is said distinctly at the end of the judgment, " it must not 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." In the province of Madras, which is governed by a body of Regulations or its own, it may well have been assumed that if those Regulations do not prescribe forms of foreclosure similar to those of Bengal, no such forms have been introduced. But the Judicial Commissioner, who decided this case, in his judgment clearly assumes that the law of foreclosure, as it obtains in the Regulation Provinces, is so far adopted that it is the course of the Courts in the Central Provinces to allow a time for foreclosure, and that some proceedings must be taken in order to obtain an absolute foreclosure: and it lay upon those who came to impeach his decision to show that his ruling was inaccurate. They have referred us to no law to that effect, and inasmuch as it is notorious that in the Non-Regulation Provinces a certain discretion is given to the Courts to apply the principles which prevail in the Regulation Provinces in the administration of justice according to the rules of equity and good conscience, their Lordships must, until the contrary is shown, presume that the law has been correctly declared by the Judicial Commissioner, who is the highest legal authority in this particular province. And if that be so, it is perfectly clear that there had been no proceedings before the assignment to the present respondents, which could in any possible way operate as a foreclosure of a mortgage by way of conditional sale. A decree was obtained, which was a mere money decree; there were then proceedings in execution irregular and inconsistent with that decree, but there was nothing which really gave the mortgagor the opportunity of coming in and redeeming; or notice

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that he would stand foreclosed if he did not redeem before a certain time.

It appears, therefore, that upon either view of the instrument the appellants have failed to show that they had before the assignment to the present respondents acquired the absolute interest in this village, and that the decision of the Judicial Commissioner, and of the Court of first instance, in this suit that the respondents are entitled to redeem on payment of the sum found due, is correct.

Their Lorpships must, therefore, humbly advise Her Majeste to affirm the decree of the Judicial Commissioner and dismisy this appeal.

Appeal dismissed.

Agents for the appellants: Messrs. *Merriman* and *Pike.*

FULL BENCH.

Before Sir Richard Couch, Kt., Chief Justice, Mr. Justice L. S. Jackson Mr. Justice Phear, Mr. Justice Ainslie, and Mr. Justice Morris:

KRISHNA KISHORE PODDAR (PLAINTIFF) *v.* WOOMESH CHUNDER ROY AND ANOTHER (DEFENDANTS).*

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Beng. Act III of 1870, *ss.* 3 *&* 5—*Transfer of Decree—Application to set aside Decree—Jurisdiction.*

When an *ex parte* decree of a Revenue Court has been transferred to the Civil Court under the provisions of s. 3 of Beng. Act III of 1870, an application to set aside the decree must be made to the Civil Court, and not to the Revenue Court.

THE plaintiff, on the 30th July 1870, obtained an *ex part,* decree against the defendants' father in the Revenue Court. Subsequently, upon an application by the defendants to set aside the decree, the Revenue Court reduced the amount awarded thereby. The plaintiff appealed to the Additional Judge, urging that the Revenue Court had no jurisdiction to entertains

* Special Appeal, No. 1601 of 1873, from a decree of the Additional Judge of Zilla Backergunge, dated the 5th of February 1873, confirming a decree of the Deputy Collector of Madareepore, dated the 30th of November 1871.