

APPELLATE JURISDICTION (a)

*Special Appeal No 15 of 1862.*MAYILARAYAR.....*Appellant.*SUBBARÁYA BHUT and others*Respondents.*

A mortgage-deed contained a condition that if the principal were not repaid by a certain day, the mortgage should only be redeemed by payment of one murá of rice for each rupee of the mortgage-money. The mortgagee was in possession under a prior iladáráwára mortgage, and rice rose in the market :—*Held* that the condition was unreasonable and such as should not be enforced in equity.

THIS was a special appeal from the decree of Lakshu mayyer, the temporary the Pincipal Sadr Amin of Mangulat, in Appeal Suit No. 174 of 1861, affirming the decree of the District Munsif of Kárkál, in Original Suit No. 94 of 1859.

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Srinivasachariyar for the appellant, the plaintiff.

The defendants did not appear.

The facts appear from the following

JUDGMENT :—The plaintiff, now special appellant, instituted the original suit for the recovery of lands under a deed of sale executed by the proprietor, the first defendant, in 1858. The plaintiff at the same time offered to pay off a iladáráwára mortgage (b) of rupees 60, which the third defendant held on the lands.

The third defendant pleaded that in addition to the mortgage admitted by the plaintiff, he held a further claim on the land under a second mortgage-deed executed by the first defendant in 1857, by which deed in consideration of further advance of rupees 60-8-0, the lands were to be held liable for the repayment of this sum in rice, at the rate of one murá for each rupee, or 60½ murás. The third

(a) Present Strange and Frere, JJ.

(b) NOTE.—This kind of mortgage occurs in Kanara, and resembles a Welsh mortgage, the mortgage being in possession and taking the rents and profits in lieu of interest, and the security carrying a right of redeem, but none to foreclose. The iladáráwára mortgage pays the Government revenue.

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defendant therefore claimed the enforcement of this lien on the land, in addition to the mortgage of rupees 60 admitted by the plaintiff.

The District Munsif was of opinion that the mortgage-deed of 1857, set up by the third defendant, which is designated as No. 1 in the record of the suit, was fully proved by credible evidence, and on these grounds adjudged the plaintiff, in taking possession of the lands under the deed of sale, to pay off this mortgage according to the terms of No. 1, in addition to the previous mortgage of rupees 60 admitted by the plaintiff. This judgment was confirmed in appeal by the Principal Sadr Amin.

The plaintiff preferred a special appeal against this decision.

The deed No. 1 is to the effect that if the advance of rupees 60-8-0 then made by the third defendant, the mortgagee, is not paid off within a certain term which has now expired, it was to be redeemed only by payment in rice at a murá for each rupee of the advance then made, or treble the amount of the original advance, at the now current market rate. This provision was most unreasonable in its character, for the third defendant had possession under the usufructuary mortgage, and could therefore realize any amount of interest which might be agreed upon, out of the net profits of the land. We are further of opinion that it is of the nature of a penal condition and as such should not be enforced in equity.

We therefore modify the decree of the Principal Sadr Amin, and award the lands to the plaintiff, who will be entitled to possession on paying off rupees 120-8-0, the amount of the principal sums respectively secured by the two mortgages held by the third defendant. The third defendant will pay the plaintiff's costs throughout.

Appeal allowed.

NOTE.—See *Jannings v. Ward*, 2 Vern. 520.