1875. *January* 29. *R. A. No.* 77 *of* 1875.

rate transaction of affairs in certain instances, and an acquisition in his own name of the property in dispute, and all these occurring in recent years. On the other side is shown a joint Hindu family deriving considerable property from the ancestor, Virappa, and living long together after his death. As to a partition the Court rightly held that none was proved, such separation as was shown falling far short of this. In this state of things, the purchases in question could not be treated as separate acquisitions made from the 1,000 Rupees, which many years before had come to him with his wife, or by means of funds arising from that money.

*Appeal dismissed with costs.*

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## Appellate Jurisdiction.(a)

*Regular Appeal No.* 90 *of* 1874.

MASHOOK AMEEN SUZZADA.....*Appellant (Plaintiff).*

MAREM REDDY, VENKATA REDDY and two others ... ... ... *Respondents (Defendants.)*

By the terms of an agreement entered into by the plaintiff and defendants, a pending suit was compromised, and payment of an ascertained balance found due by plaintiff was secured by the creditors (defendants) being placed in possession of plaintiff's land for 55 years, with the right of enjoying all the rents and profits thereof, subject to the payment of a fixed rent, part of which was to be paid to the plaintiff, and the remainder to be retained by the creditors towards payment of the debt. *Held,* that the agreement was a mortgage, and, as such, redeemable on the usual terms.

1875. *February* 5. *R. A. No.* 90 *of* 1874.

THIS was a Regular Appeal against the decision of Mr. J. R. Daniel, the Acting District Judge of Nellore, in Original Suit No. 6 of 1874.

On the 10th October 1857 a razinamah was entered into between the plaintiff and the defendants in Original Suit No. 2 of 1852, on the file of the District Court of Nellore. The plaintiff was found indebted to the defendants in the sum of Rupees 6,538, and, in order to secure this sum, and a debt of Rupees 510 due to the defendants by one Jorabibi, the plaintiff's grandmother, defendants were let into possession of the land now sought to be redeemed, on a fixed rent of Rupees 298 for

(a) Present:—Sir W. Morgan, C. J., and Kindersley, J.

1875. *February* 5. *R. A. No.* 90 *of* 1874.

the term of 55 years. Out of this fixed rent of Rupees 298 the defendants were to pay annually to the plaintiff the sum of Rupees 169, crediting the balance Rupees 129 in liquidation of the debt.

Deducting payments made up to the filing of the suit, there was a balance due by the plaintiff to the defendants of Rupees 4,801, upon payment of which the plaintiff sought to redeem the lands mentioned in the plaint. The defendants refused to receive the money tendered or to deliver up the lands, on the ground that the agreement entered into by the parties was not a mortgage but a lease for 55 years.

The Acting Civil Judge held that the agreement was an usufructuary mortgage for a fixed term of years, and that as that term had not expired, the plaintiff had no present right of redemption. His judgment was as follows:—

"It is undoubtedly an usufructuary mortgage, and the question is, whether being granted for a fixed term of years the plaintiff has a right to present redemption without any clause in the agreement to that effect.

The case at page 363, Volume 3, H. C. R. (1) adduced in support of plaintiff's case, is not a case in point, in that instrument there was a special clause allowing redemption within the term, and the Judges expressly refrain from giving their opinion on the case, if the special clause was excluded.

Another case quoted by plaintiff's pleader, is certainly more to the point, but it is not published under any authority and therefore is not binding. This was a miscellaneous order passed by the Civil Judge, in Original Suit No. 3 of 1867, on the file of this Court, and confirmed in appeal by the High Court, (Civil Miscellaneous Regular Appeal No. 121 of 1871.) Here the principal amount secured, was Rupees 9,890, and a village was mortgaged for a term of 30 years, the mortgagor paying annually interest of Rupees 890, and paying the principal sum after the expiration of the term. Here the mortgagor was permitted to pay the principal within the 30 years. The case somewhat differs from the

(1) *B. Dorappa* v. *Kundukuri Mallikarjunudu.*

1875. *February* 5. *R. A. No.* 90 *of* 1874.

present, and I do not know the principle on which it was decided, as the judgment of the High Court merely confirms the order, and the reasons are not given. I do not therefore feel bound by this as an authority. On behalf of defendant a case decided by the Calcutta High Court, at page 527 of Cowell's Digest, *Soorjun Chowdhry* v. *Imambandee Begum*, (1) was quoted against the right of immediate redemption, this is called a zur-i-peshgee lease, and the principal, and interest, was to be cleared off by the usufruct of the property, the balance found due at the end of the period, was to be paid by the lessor, and he was to take possession, he was not allowed to take possession before the expiry of the term.

In this case the reasons for the decision are not known.

The case must be decided according to the intention of the parties, and it seems to me that the clear intention was, that the debt should be paid off by the enjoyment of the land for the full term of 55 years, and the mortgagor should not be entitled to redeem before. I can find nothing in the rules of equity regarding redemption, which will assist a mortgagor in relieving himself from the consequences of his own contract in this respect, because, he afterwards changes his mind, and wants to recede from his contract. A man cannot make a mortgage, and at the same time stipulate that there shall be no right of redemption, if he does, equity will relieve him and allow him to redeem in spite of his agreement, but here the right of redemption exists, though it cannot be enforced until the expiry of a term. In the present agreement no interest is charged, in lieu of that, the mortgagee is to receive any profits which he may be able to obtain from the land in excess of the rent, which he is bound to pay to the mortgagor, he must pay the rent whether the land yields a profit or loss, he cannot claim the principal now if he wished, and therefore the mortgagor cannot claim immediate possession of the land; as therefore, the terms of the contract are expressly against the present right of redemption, and there is in my opinion no equitable reason why the

(1) 12 W. R., p. 527.

1875. *February* 5. *R. A. No.* 90 *of* 1874.

contract should be set aside in favor of the mortgagor, I dismiss the suit with costs."

From this decision the plaintiff appealed to the High Court on the following, among other grounds :—

The plaintiff is entitled in equity, and under the terms of Exhibit A, to redeem at once the property in question by payment of the mortgage amount.

The plaintiff's right of redemption is absolute, and can be exercised in equity at any time before it is barred by lapse of time.

The provisions entered in Exhibit A are for the benefit of the plaintiff, and if he chose to waive them, he cannot be compelled to adhere to the same.

*Mr. Miller*, for the appellant :—This is a suit to redeem an usufructuary mortgage. It is resisted on the ground that the time specified in the razinama creating the mortgage has not yet expired. *B. Dorappa* v. *Kundukuri Mallikarjunudu* (1) is really on all fours with the present. The matter of the provision for payment within two months having been got rid of, the facts are identical. Then Original Suit No. 3 of 1867, is exactly in point. The Judge disregarded it; but he is bound by his own previous decision. If we look to the intention of the parties, it was merely the repayment of a debt.

*The Advocate-General* for the respondents :—This was not a simple usufructuary mortgage, but a lease, and an arrangement for payment thereon. There was a lease in existence before Original Suit No. 2 of 1854 was brought, Regulation 34 of 1802, s. 8, (*a*) refers only to cases where no time is specified. The English law is clear on the subject. II W. and T. 887 : *Brown* v. *Cole*, 14 Sim. 427 ; 1 Fisher 656;

(1) 3 Madras H. C. Rep., p. 363.

(*a*) Act XXVIII of 1855, Section 1, repealed Section 3 of 13 Geo. 3, c. 63, and all the usury laws in force with the Regulations mentioned in the Schedule. Sections 2, 4, 5 and 6 of Regulation 34 of 1802 of the Madras Code are repealed thereby "and Section 8 of the same Regulation so far as it may be deemed to limit the rate of interest to be allowed on mortgage bonds."

1875. *February* 5. *R. A. No.* 90 *of* 1874.

such arrangements are good for both parties. See also *Khajah Lotf Ali* v. *Gujraj Thakoor*, XI Suth. W. R., 408; and *Soorjun Chowdhry* v. *Imambandee Begum*, XII W. R., 527.

The arrangement here was called a "lease." It was a fair arrangement for paying off the debt. It would be unfair for the tenant to be turned out at any moment the mortgagor pleases; and we have a right to take our chance of good and bad seasons over the long prescribed period. Then again the Hindu law appears to forbid the redemption of a mortgage before the time settled. *B. Dorappa* v. *Kundukuri Mallikarjunudu*.(1) The only ground for the Court to proceed upon, is the *intention* of the parties.

*Mr. Miller* in reply.—The facts of the case indicate that it was practically one of mortgage. The 4,000 Rupees alleged to have been spent on improvements for 17 years, is no great sum, and the mortgagee has no doubt received the full amount by this time from the produce of the land.

SIR W. MORGAN, C.J.:—The cases come to this, that when once you get a debt with the security of land or its payment, then the arrangement is a mortgage, by whatever name it is called. If we find here that the transaction was a mortgage, then justice will be done by allowing the money to be paid. If on the other hand, we find that it was practically a sale of the property for 55 years, then it cannot be set aside. That is the principle on which our decision will be grounded.

*Cur. Adv. Vult.*

JUDGMENT:—The Court below having found the lease for 55 years to be "undoubtedly an usufructuary mortgage," nevertheless held that no right of redemption existed during the term. Now if it is once ascertained that the parties intended to create a mortgage security and not to convey an absolute interest, the transaction will always be regarded as a mortgage and redeemable on the usual terms.

We are satisfied that the terms of the arrangement itself, by which a pending suit was compromised and payment of a balance (ascertained to be due on a settlement of

(1) 3 Madras H. C. Rep., p. 363, (at p. 366).

1875. *February* 5. *R. A. No.* 90 *of* 1874.

accounts) was secured, import nothing more than the creation of a security for this debt. The defendants, the creditors, are thereby allowed to occupy the land for 55 years at a fixed rent of 280 Rupees out of which, after deducting 160 Rupees for the plaintiff's maintenance and other specified purposes, 120 Rupees are declared to be applicable in liquidation of the debt of 6,538 Rupees ascertained to be due. In this way the debt would be liquidated in 55 years, the defendants during such period having full possession and enjoyment of the land and its profits. In thus providing for the gradual liquidation of the debt and the extension of the period of payment there is no certain indication of an intention to create an absolute lease of the land or to put an end completely to the relation of debtor and creditor previously existing. We are of opinion that, according to the true construction of the document, it creates a mortgage security and the decree dismissing the suit for redemption must be reversed. The case must be remanded to the Court below. Each party will bear their own costs of this Appeal.

*Appeal allowed and case remanded.*

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## Appellate Jurisdiction.(a)

*Referred Case No.* 3 *of* 1875.

KUNDEME NAINE BOOCHE NAIDOO..*Plaintiff.*

RAVOO LUTCHMEEPATY NAIDOO and another.....*Defendants.*

Where plaintiff's sheep had been attached in satisfaction of a decree against a third party, and the 2nd defendant had purchased the property at the Court sale :—*Held*, that a suit merely to recover the sheep or their value is cognizable by a Small Cause Court.

1875. *February* 22. *R. C. No.* 3 *of* 1875.

THIS was a case referred for the opinion of the High Court by Mr. J. C. Hughesdon, the Judge of the Court of Small Causes, Vellore.

No Counsel were instructed.

The facts sufficiently appear from the following

JUDGMENT :—The first defendant in this suit had attached a flock of sheep belonging to the plaintiff in satisfaction

(a) Present :—Sir W. Morgan, C.J., and Kindersley, J.