1874.
November 20.

The Court delivered the following

JUDGMENT:—The High Court are of opinion that a suit decided under the Indian Divorce Act (IV of 1859) is clearly a suit decided on the merits.

The value of the suit, in this case ten times the amount of alimony for one year, is the only basis for the estimation of the pleader's fees, because the only one prescribed by the regulation.(*a*)

The case cannot be altered by a special provision of the Divorce Act authorizing a particular stamp, whatever the value.

Appellate Jurisdiction.(*a*)

Special Appeal No. 551 *of* 1874.

SAMATHAL ... ... *Special Appellant* (*2nd Plff.*)

HER HIGHNESS THE MAHARAJA MATHOOSRI KAMATCHI AMMA BOYI SAIB AVERGUL and five others. } *Respondents* (*Defendants.*)

Where a document is, on its face, a mortgage, the right to redeem is so much an essential as not to be variable by agreement. The question of intention *extra* the document does not, therefore, arise.

1874.
December 7.
S. A. No. 551 *of* 1874.

THESE were Special Appeals against the decisions of Arunachella Iyer, the Subordinate Judge of South Tanjore, in Regular Appeals Nos. 5, 6, 7 and 8 of 1874, reversing the Decrees of the Court of the Additional District Munsif of Tanjore, in Original Suits Nos. 302, 303, 304 and 308 of 1872 respectively.

Plaintiff sought to redeem certain lands, alleged to have been mortgaged by his father to the 1st defendant's relation,

(*a*) Regulation XIV of 1816, Section 25, so far as it affects the case above stated, is as follows—"In all regular suits which may be instituted, either originally or in appeal, from and after the 1st day of February 1817, in any of the Zillah Courts, the Provincial Courts, or the Sadr Adálat, the Vakils employed for the respective parties are to be allowed, for pleading the causes of their clients, the rates of fees calculated as follows:—* * * * *

If the amount or value shall exceed 5,000 Rupees and shall not exceed 20,000 *Arcot* Rupees, on 5,000 as above (5 *per cent.*) and on the remainder two per cent."

(*a*) Present: Morgan, C. J. and Holloway, J.

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Mohana Avu Saib, 50 years ago. He alleged that the mortgage debt had been satisfied from the usufruct of the land, and that a surplus of Rupees 4-11-5 had accrued, which he also sought to recover, defendants 2 to 5 were included as the heirs of the person who had obtained the land on sub-mortgage, and the 6th as being in possession of the land. Plaintiff having died, his widow was included as second plaintiff.

The 1st defendant was *ex parte.*

The 4th defendant denied the mortgage alleged by plaintiff, and contended that the land, together with seven other lots, had been conveyed to Mohana Avu Saib by plaintiff's father and others, under the deed of conditional sale (marked I,) and that Mohana Avu Saib assigned her interest under II to the father of the defendants 2 to 5.

The 2nd and 5th defendants pleaded that the land was their ancestral property.

The 6th defendant contended that he was in possession of the land as lessee from defendants 2 to 5.

The issues settled were ;—

1. Is the suit barred by the Limitation Act ?

2. Does the disputed land belong to plaintiff's family, or to 2nd and 5th defendants' family ?

3. Is the mortgage alleged true ?

The Munsif found that plaintiff had proved the mortgage, and that it was still a mortgage. He gave judgment allowing plaintiff to redeem the land on payment of the mortgage money, and disallowing the surplus profits.

The 2nd, 4th and 5th defendants appealed on the grounds, among others, that the plaintiff's claim was barred by the Act of Limitation, the hostile possession of the defendants having commenced in 1830.

The following is taken from the judgment of the Subordinate Judge ;—

"The questions for decision in this appeal are, whether the plaint mortgage is true, and whether the relief sought

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for can be allowed upon the strength of the documents filed by defendants.

1st question.—I am of opinion that the plaint mortgage is not proved.

The 2nd question.—Defendants' (2 to 5) story as to how they acquired this land, and the lands claimed in Appeal Suit Nos. 5, 7 and 8 is, that the owners of each lot jointly conveyed the whole piece under I to Mohana Avu Saib and that Mohana Avu Saib, by virtue of I, became absolute owner, and that she conveyed her interest to their father under II. The determination of its *bonâ fides*, and a proper construction thereupon are now necessary. I is dated in 1811, and its appearance fully justifies its age. It has come from proper custody. It is besides, proved by the evidence of 1st and 3rd witnesses examined by 4th defendant, and further its genuineness was not disputed by plaintiff, but he simply stated, in his deposition, that he does not know whether the document is true or not. Its language is as follows:— "Bhoggiandi (mortgage, &c.,) bond executed to Mathosri "Mohanaboyi Saib by the Perumal Covil Stanigams and "Mirasidars of Candiyur village mortgaging nunjah lands "dated 20th Avany of Prajothpathy."

"We hereby mortgage to you for 268 pons $8\frac{1}{2}$ fanams "$1\frac{33}{80}$ out of $6\frac{201}{326}$ karais of lands belonging to us 8 in number "in the said village which is divided into 20 Ganasaukiya "bagam (shares), viz. $\frac{1}{4}$ of $1\frac{69}{160}$ karais belonging to Perumal "Covil Pannaikarai is mortgaged for 47 pons and 2 fanams "$\frac{21}{160}$ of $1\frac{53}{320}$ karais belonging to Anaiya Pillai is mortgaged "for 30 pons; $\frac{19}{160}$ of $1\frac{137}{320}$ karais belonging to Chinnatambia "Pillai is mortgaged for 90 pons; $\frac{19}{320}$ of $\frac{217}{320}$ karai belonging "to Marudai Pillai is mortgaged for 5 pons and $7\frac{3}{4}$ fanams; "$\frac{67}{320}$ of $\frac{3}{80}$ karai belonging to Thonthia Pillai is mortgaged "for 61 pons; $\frac{5}{160}$ of $\frac{29}{160}$ karai belonging to Koothaperumal "Pillai is mortgaged for 3 pons; $\frac{3}{40}$ of $\frac{12}{70}$ karai belonging "to Marudanayagam Pillai is mortgaged for 16 pons and $8\frac{3}{4}$ "fanams; and $\frac{7}{80}$ of $\frac{7}{16}$ karai belonging to Iyya Pillai is "mortgaged for 15 pons. Since we have mortgaged our "lands to you as specified above, and have each received "the mortgaged amount from you, you are to enjoy in

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" lieu of interest the aforesaid $1\frac{33}{80}$ karais with the nunja " and manaicut lands thereunto attached together with " the ground and also pallateru grounds to the extent " of 320 gulies. You are also to pay all the expenses and " render all services according to the usage on account of " those lands. You are also to pay to the Eesran Covil and " Perumal Covil the Thunduvarram at the rate of $2\frac{1}{2}$ callams " per cent. on the produce of the above said $1\frac{33}{80}$ karais. " You are to enjoy the said lands for this year and deliver " them to us in Vyasy of Angila after receiving from us the " said amount. In default of payment at the said term you " are to enjoy the said lands for four years from this date " and to give up the lands on payment by us of the mort-" gage sum in current monies in Vyasy of the year Yava. In " case we should fail to redeem the said lands from you " even on the expiration of the term last mentioned, you are " to enjoy the said $1\frac{33}{80}$ karais of land from generation to " generation and with right to dispose of the same by gift, " sale, &c., as if they were sold to you. We the Perumal " Covil Stanigams and Mirasidars of the Candiyur village do " hereby execute to you Mathasri Mohanaboyi Saib this " Boggiandi (mortgage, &c.) deed with our free will. The " writer of this mortgage bond is Panchanadam Pillai of " Candayar. When the mortgage amount is paid and the " lands redeemed each individual is to pay his share of the " amount and redeem his share of the land."

The appellant's vakil contends, and with reason, that if mortgage only had been the intention of the parties to I, the word "Boggiam" alone would have found a place therein, but as the words used are "*Boggi Andi*" (which mean Boggiam and other tenure) the parties had it in their intention to convert the mortgage into an absolute sale, if the same were not redeemed by the time fixed. I fully agree with him, and hold that Mahana Avu Saib become absolute owner of the land conveyed to her under I after the expiry of the second period allowed to the executors thereof for redemption. The absolute title acquired by the defendants' (2 to 5) father under II (which also I hold genuine) ought of course, to be upheld.

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Under the foregoing view of the case I reverse the original decree, and dismiss the suit with costs throughout."

The plaintiff preferred a Special Appeal on the ground, among others, that she was entitled to redeem the lands from the defendants.

Ráma Rau, for the special appellants.

The *Advocate-General*, for the 2nd to 6th special respondents.

The Court delivered the following

JUDGMENT:—In this case the transaction is, on its face, a mortgage, and the decisions of this Court (Nalana Goundan *v.* Palani Goundan, II, M. H. C. Rep., 420 and many others) have followed the English principle that the right to redeem is so much an essential as not to be variable by agreement. The question of intention *extra* the documents does not therefore arise.

If it did, the words of the transfer are quite as much in favor of the mere transfer of a mortgage as of a pretence to sell. The amount paid being the exact amount of the mortgage debt, and the covenant that the transferee shall defend the title, are still more so.

There is, therefore, no place for the application of the doctrine of shortened limitation in the case of *boná fide* purchasers for value.

The nature of the title is quite apparent upon the face of the documents, and *boná fides*, as applied to this matter means, without notice of the title of another.

If, therefore, there had been a sale, the section ought not to have been applied, but there is not. It is a mere transfer of all that the alienor had. We must, therefore, reverse the decree of the Lower Court, and remit the case for decision upon the footing that the transaction is a mortgage and not a sale.

The costs of this appeal will be provided for in the revised decree.

Appeal allowed and case remitted.