## Appellate Jurisdiction. (a)

*Regular Appeal No.* 48 *of* 1871.

SRI' RA'JAH LAKSHMI CHELLIAH GA'RU, legal representative of SRI' RA'JAH SI'TARA'MA KRISHNA RA'YADAPPAH RANGA RAU BA'HA'DU'R GA'RU, ZAMINDA'R of BOBBILI. } *Appellant.*

SRI' RA'JAH SRI' KRISHNA BHUPATI DE'VU MA'HARAZ GA'RU, ZAMINDA'R of MADUGULA. } *Respondent.*

Plaintiff executed to defendant a document of which the following is a translation :—" The *Muddata Kriyam* executed on the 10th April " 1835 by the Madugula Zamindár to the Zamindár of Bobbili. As I " have conveyed to you as sale for Rupees 6,000 the Papuchetti Seri " adjoining the land of Kasbah Jagganánthapuram in the Zamindárí " of Madugula, they are given you for absolute sale : so the said sale " money has been received at the time of sale. In the event of my " paying you the principal Rupees 6,000 within six months from this " date, you must give back the said land Papuchetti Seri to me. In the " event of our not being able to pay according to the said stipulation, " you should hereditarily from son to grandson enjoy the produce of " the said land, yourself paying to Government the assessment fixed " on a sub-division, reckoning this sale money to be a pure sale. This " *Muddata Kriyam* has been executed with my consent." *Held*, that this document was a sale with a condition for re-purchase.

The decisions of the late Sadr Court of Madras have carried the doctrine of relief after the time named in the conveyance so far as to say that wherever the security for money is an object of the transaction, no sale can become absolute. The High Court have followed the English rule and have held the question one of construction, admitting however, for the purposes of the construction, other documents and oral evidence.

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THIS was a Regular Appeal against the decision of F. C. Carr, the Acting Civil Judge of Vizagapatam, in Original Suit No. 56 of 1865.

The suit was brought to recover possession of a málguzári land called Papuchetti Seri, yielding annually Rupees 977-0-8, and its mesne profits Rupees 7,963-6-10.

It was alleged in the plaint that the plaintiff, having contracted a debt of Rupees 6,000 with the defendant's father, on the security of Papuchetti Seri land situated in the plaintiff's Zamindárí of Madugula, on 10th April 1835 executed a conditional sale-deed in favor of the latter, with the proviso that if the sum of Rupees 6,000 should be repaid within six months the land should revert to the plaintiff :

(a) Present : Holloway and Innes, JJ.

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that the land had been in the possession of the defendant's father in liquidation of the debt ever since, the plaintiff paying the revenue. That the principal sum of Rupees 6,000 was liquidated by the 29th November 1856: that subsequently the rent of the land under dispute for three Faslis, 1271-72 and 73, corresponding with 1861, 62 and 63, amounting to Rupees 2,361, (which the defendant had realized in excess of the debt) was paid to plaintiff by the defendant's clerk: that the defendant's father died in 1862 without settling the transaction, and defendant also refused to do so.

The plaintiff, therefore, prayed for a decree for the possession of the land in question, together with the mesne profits realized by defendant in excess of his debt, and subsequent profits and costs and interest thereon at 1 per cent. per mensem, making the defendant and his estate answerable to the plaintiff's claim.

The defendant, in his written statement, relied upon the stipulation in the deed, and contended that as the plaintiff did not repay the Rupees 6,000 within the time fixed, the sale became an absolute one.

He denied that the rent for Faslis 1271, 1272 and 1273 had been paid to the plaintiff and asserted that the land did not realize the rent stated by the plaintiff.

The following issues were settled:

1. Whether the rents or mesne profits of Faslis 1271, 1272 and 1273, or of any and which of those Faslis were paid over by the defendant to the plaintiff?

2. Whether the document Exhibit I is to be regarded as a deed of conditional sale, under which the sale has now become absolute, or as a deed of mortgage by way of securing the sum advanced, and the plaintiff is consequently now entitled to sue to redeem the lands specified therein?

3. If the document is to be regarded as a deed of mortgage, then what sum, if any, is now due from defendant to the plaintiff on account of surplus mesne profits received?

The Civil Judge (J. G. Thompson) by whom the case was first heard, found upon the second issue that "the plaintiff

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did deliberately sell the land with a condition for re-purchase at a particular time, and it is admitted that at that particular time he failed to re-purchase, so that there is now no equity to relieve against the sale." He accordingly decided that the sale had become absolute, and dismissed the plaintiff's suit.

Upon appeal to the High Court, this decision was reversed, and the case remanded for re-trial; "Since the decision whether the transaction was to be regarded as a mortgage, or a sale, depended upon the original intention of the parties, which intention was to be ascertained, not by a perusal of the document only, but by a consideration of all the circumstances of the case."

The case was accordingly re-heard, and the Civil Judge (F. C. Carr) delivered a judgment from which the following is taken :—

"The plaintiff has examined 10 witnesses and filed documents marked A to S. His statement of the case, as supported by this testimony, is that the transaction referred to was intended by the parties themselves at the time to be only a mortgage; that they treated it afterwards as a mortgage, and never as an absolute sale; that the document itself shows it to have been a mortgage, and although there was in the document a stipulation for an absolute sale in case of failure to pay within six months, such stipulation must be considered in the light of a penalty which could not be enforced; and that, even though that time elapsed without such payment being made, the plaintiff was nevertheless entitled to redeem. Further, it was argued that by the terms of Regulation XXV of 1802, Section 8, no sale of a part of the plaintiff's Zamindárí could be held valid unless it were registered by the Collector, and there is no pretension on the part of the defendant that such registration was ever attempted.

The document is dated on the 10th April 1835, and it is proved by the witnesses that at that time the plaintiff's Zamindárí of Madugula was under attachment, and that in order to relieve it from attachment, and to meet his necessities, the plaintiff, the Zamindár of Madugula, applied to

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the Zamindár of Bobbili for a loan of Rupees 40,000. Five villages of the Madugula estate were then sold to the Zamindár of Bobbili. The sum was deposited in the treasury, and the sale completed with all due formalities: the sale deed was produced by the Record keeper of the Collector's kachahrí, who also brought the book called the Register of Estates, in which is the following entry :—"This is to certify that the villages Kasbah Jagganáthapúram, and Dandi Suravaram have been transferred by private sale to Sivata Chellapatti Ranga Rau, Zamindár of Bobbili, by Krishna Bhupati, Zamindár of Madugula, and registered this 23rd July 1836 by sanction of the Board of Revenue under date the 30th June 1836."

Signed "A. FREESE—Collector."

This indisputably established the fact that at the time when this bond for Rupees 6,000 was executed, certain villages were actually sold by the plaintiff.....

It remains to consider the terms of the document itself, the translation of which is as follows :—

"The '*Muddata kriyam*' executed on the 10th April 1835 by the Madugula Zamindár to the Zamindár of Bobbili."

"As I have conveyed to you as sale for Rupees 6,000 "the Papuchetti Seri adjoining the land of Kasbah Jagga- "náthapúram in the Zamindárí of Madugula, they are given 'you for absolute sale: so the said sale money has been "received at the time of sale. In the event of my paying "you the principal Rupees 6,000 within six months from "this date, you must give back the said land Papuchetti "Seri to me. In the event of our not being able to pay "according to the said stipulation, you should hereditarily "from son to grandson enjoy the produce of the said land "yourself paying to Government the assessment fixed on a "sub-division, reckoning this sale money to be a pure sale. "This '*Muddata kriyam*' has been executed with my con- "sent."

The word "*Muddata kriyam*" is thus translated by Professor Wilson, in his Glossary of Indian terms.—"Land mortgaged with option to the lendee to consider it as his

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property if the mortgage is not redeemed within a stipulated period."

It will thus be seen by the name of the document itself, and by the terms of the same, that it was not intended by the plaintiff at the time to make this an *absolute* sale. Where the intention is to convey property by a deed of sale the word " kriyam" would invariably be simply used before the word deed, and not " Muddata kriyam."

Then, again, it is clear from the evidence produced, both oral and documentary, that about the very same time this " Muddata kriyam" deed was executed, the plaintiff had given certain of his villages by absolute sale to the Zamindár of Bobbili. These latter were given with all due formality, the sale was regularly registered, the document given was an ordinary deed of sale, and these villages were sub-divided by the Revenue authorities from the estate of Madugula and added to the estate of Bobbili. If, therefore, it had been the intention of the parties to this contract to have it also considered as an absolute sale, there can be no doubt that they would in this case also have followed the same course, and gone through the same formalities: and as they did not, but on the contrary made a differently headed and worded document, and did not register the sale, it may be concluded that in this instance they both regarded it in the light of a mortgage.

The next question which arises is whether, granting that the transaction was to be regarded *at first* as a mortgage, after the lapse of the six months therein specified without the re-payment of the money, the document could be considered as having (as its terms imply) the full force of a sale deed. This is virtually already settled by the High Court in their appeal judgment, where they say that the question whether the transaction was to be regarded as a mortgage, or sale, depended upon the *original* intention of the parties, and not upon the words of their written contract. Therefore, as we have seen that the intention of the parties at the time was that of a mortgage, we must consider the force of the mortgage to obtain even now, although the stipulated period has long been exceeded.

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Further, as was pointed out by the pleader for the plaintiff, the recent rulings of the Court have been, in cases of this nature, to the effect that although there be in the written bond a strict provision that, in failure of payment after a stipulated period, the mortgagee shall be put in exclusive possession and enjoyment of the property, and the transaction be considered from that time an absolute sale, still " the mortgagor may in equity and good conscience redeem the property by paying off the debt, though the stipulated time for payment has been allowed to pass by."(*a*) Under this view of the case, the proviso making this document an absolute sale will be a dead letter, a penalty which the law will not enforce.

Lastly, there is on the plaintiff's side this argument, that unless all the formalities laid down in Section 8, Regulation XXV of 1802 be complied with, a sale otherwise valid is null and void....."

" The decree therefore of this Court now is that the defendant do deliver over to the plaintiff the land called Papuchetti Seri, which had been transferred to the possession of the late Zamindár of Bobbili, under the Exhibit I produced by her in this suit, upon the plaintiff paying to the defendant Rupees 6,000."

The defendant appealed upon the grounds—

(1.) That upon the true construction of the documents and upon the evidence, the Civil Judge ought to have found that there had been a conditional sale to the Zamindár of Bobbili which had become absolute by virtue of the failure to repay the price within the stipulated time.

(2.) That the Civil Judge was wrong in holding that such conditional sale would be invalid for want of registration.

*The Advocate-General*, for the appellant, the defendant.

*Miller*, for the respondent, the plaintiff.

The Court delivered the following

JUDGMENT :—The question is whether the transaction of 1835 is a mortgage or sale.

(*a*) I, M. H. C. R., 464.

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If we were bound by a case recently decided in the Privy Council, the appellant must necessarily succeed, for the Judicial Committee observe that there has been no course of decision in Madras admitting of relief after the time. They base their judgment upon this, and intimate that it would have been the other way if the fact were otherwise. It is otherwise, for the decisions of the late Sadr Court since 1858 have carried the doctrine so far as to say that wherever the security for money is an object of the transaction, no sale can become absolute. The High Court have followed the English rule which the Sadr Court intended to follow, and have held the question one of construction, admitting however, for the purposes of the construction, other documents and oral evidence. On its face this document is plainly a sale with a condition for repurchase. No Hindu would ever read it otherwise. The oral evidence adduced to show the intention other than the document imports is mere expression of opinion. The alleged payments to Kondal Rau's son are not marked as payments for any particular purpose. If, as the oral evidence alleges, they were on account of usufruct because the balance was discharged, it is inconceivable that so many years should have been allowed to elapse without claiming the property. The obtaining of an extension of the term is in favour of the sale as showing the belief of the vendor that the lapse of it would be fatal. The length of time (30 years) is in favour of the hypothesis of sale, as is the fact, much noticed in all the English cases, that there is no remedy for the vendee's money and no interest charged upon it. That the natural construction of the document is sale with liberty to re-purchase is plain; it seems to us that the circumstances of the case reinforce instead of explaining away that construction. *Gossip* v. *Wright*, (*a*) quoted by the Advocate-General from the Law Journal and by Dart, V. & P. from the Jurist, is not in the regular reports. The doctrine of the case, so far as it was read, was quite consistent with that of *Alderson* v. *White*, (*b*) to which reference was made in II, M. H. C. R., 422 (see note on that case, undoubtedly a very strong one, Dart, V. & P., 753). If the objection on the Registration Act were well

(*a*) 9, Jur. N. S., 592. (*b*) 2, De G. & J., 97.

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founded, the result would be fatal to this suit, for the fact of a document not being enforceable as a sale will not convert it into a mortgage, and the result would be 30 years' possession of defendant without title. The evidence seems to us to leave no doubt as to the intention, and we reverse the decree of the Lower Court and dismiss the Original Suit with all costs.

*Appeal allowed.*

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## Appellate Jurisdiction. (*a*)

*Special Appeal No.* 368 *of* 1871.

SOMU GURUKKAL..... .....*Special Appellant.*

RANGAMMA'L and 3 others.....*Special Respondents.*

The plaintiff sued to recover certain immovable property sold to him by the 1st defendant by a registered deed of sale executed on the 23rd of July 1868. The 2nd, 3rd and 4th defendants pleaded a sale to them by the same party, the 1st defendant, on the 23rd March 1867, and that the 1st defendant, after receiving consideration in full, had improperly refused to have their deed of sale registered. The provisions of Section 49 of the Registration Act of 1866 precluded the reception in evidence of the prior unregistered instrument of conveyance, but the Lower Courts held that certain admissions made by 1st defendant in an enquiry held before the Registration officer were admissible in evidence to prove the sale to 3rd and 4th defendants. The suit was, therefore, dismissed with costs. Upon Special Appeal *Held*, by INNES and KINDERSLEY, JJ., that the admissions made by 1st defendant were evidence against plaintiff, as made by one from whom plaintiff derived his title, but that the provisions of the Registration Act precluded any effect being given to the sale evidenced by such admissions: there being a writing, the sale could not be proved by mere oral evidence.

By INNES, J.—The term 'instrument,' in Section 49 of Act XX of 1866, is used on the understanding that the writing is not merely evidence of the transaction but is the transaction itself.

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THIS was a Special Appeal against the decision of C. R. Pelly, the Acting Civil Judge of Tranquebar, in Regular Appeal No. 1 of 1870, confirming the decree of the Judge of the Court of Small Causes at Negapatam on the Principal Sadr Amín's side, in Original Suit No. 62 of 1869.

The plaintiff sued to recover certain land and houses under a deed of sale, Exhibit A, executed to him by 1st defendant on the 23rd July 1868, together with the value of produce carried off and trees felled by the 2nd, 3rd and 4th defendants. 1st defendant allowed the suit to proceed ex-

(*a*) Present: Innes and Kindersley, JJ.