Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Thumbasawmy Mudelly, and another, v. *Mahomed Hossain Rowthen, and others, from the High Court of Judicature at Madras; delivered 26th June*, 1875.

Present:

SIR JAMES W. COLVILE.
SIR BARNES PEACOCK.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.

IN the year 1815 certain persons described as the Mirasi proprietors of eight shares in Rajagiri executed the deed of the 2nd of July of that year, which is set out at page 35 of the Record. It purports on the face of it to be a deed of usufructuary mortgage of certain lands in the hamlet of Manmoda, which is attached to Rajagiri, and to be made in favour of one Appavoo Modaliar, for the purpose of securing the repayment of 2,500 pons in the manner therein specified.

The name of Appavoo was, however, used for that of Saminadha Modaliar, who was the real mortgagee, and is now represented by the Appellants. The Respondents are the representatives of the mortgagors. This deed must now be taken to comprise all the terms of the contract; and the only question is whether by force, and according to the tenor, of its provisions the mortgagees became in 1820 the absolute proprietors of the property; or whether they continued to hold it as mortagagees, subject to the right of redemption, in which case the mortgage debt is admitted to have been liquidated by the usufruct at the close of the year 1866-67. The Civil Court at Tanjore, and the High Court of Madras, have taken the latter view of the trans-

action, and have given the Respondents, the Plaintiffs in the suit, a Decree for the lands with mesne profits from the above-mentioned date.

In impugning this Decree the Appellants have chiefly relied upon the law as laid down by this Committee in the case of Pattabhiramier *v.* Vencatow Naicken and another, 13 Moore's I. A., p. 560. And the contention before us has raised two questions, first, whether that case, if assumed to contain a correct exposition of the law prevailing in the Presidency of Fort St. George, governs the present; and, secondly, how far that exposition is to be taken to be of binding authority, regard being had to one passage in their Lordships' Judgment, and to the course of decision in the Courts of Madras.

Their Lordships will in the first instance proceed to determine the first of these questions.

Now, what was really decided by the case in the 13th Moore I. A.? It was that the contract of mortgage by conditional sale is a form of security known under various names throughout India; that according to the ancient law of India it was enforceable according to its letter; and that, whether it was embodied in one instrument or in two separate instruments, and whether or not the transaction appeared on the face of the instrument to be in its inception a mortgage; and further that this law must be taken to prevail in every part of India in which it had not been modified either by actual legislation or by established practice.

The subject matter of the decision, therefore, is the contract of mortgage by conditional sale.

Mr. Justice MacPherson, in his work upon mortgages, thus defines, and, as their Lordships think, accurately defines, this form of security. He says: "The mortgage by conditional sale, 'kut-kubala,' or 'bye-bîl-wufa,' is that in which the borrower, not making himself personally liable for the repayment of the loan, covenants that, on default of payment of principal and interest on a certain date, the land pledged shall pass to the mortgagee." Such a mortgage might or might not be usufructuary. If usufructuary, it usually contained a stipulation that the usufruct should be in lieu of interest. The effect of such a stipulation was modified by legislation in consequence of the laws against usury, but has, by Act XXVIII of 1855, been restored in its

integrity as to all contracts made subsequent to the passing of that Act. The essential characteristic of a mortgage by conditional sale was that, on the breach of the condition, the contract executed itself, and the transaction was closed and became one of absolute sale without any further act of the parties or accountability between them. That it still has this effect in the Presidency of Madras was what was decided by the case in the 13th Moore I. A.

Such a security, however, seems to be very distinguishable from that which is in question in this suit. By the deed of the 2nd of July 1815, the mortgagors stated that, by reason of urgent need, they had mortgaged to the mortgagee and put him in possession of the lands in question; and that they had agreed to pay the principal sum of 2,500 pons (which was made up of 1,000 pons borrowed in cash, and a debt which they had undertaken to pay) with interest at 1 fanam per 10 pons per mensem; they then stipulated that the rents should be applied first in payment of the Government revenue; next, in payment of the salary of a manager; and afterwards, in reduction of the debt. So far the security does not differ from a simple usufructuary mortgage. Then follows this clause: "The instalments for this money are as follows:— To be paid on the 30th Panguni of Yuva (corresponding to 9th April, 1816), 500 pons; on the 30th Panguni of Dhata (corresponding to the 10th of April, 1817), 500 pons; on the 30th Panguni of Iswara (corresponding to), 500 pons; on the 30th Panguni of Bahudhania (corresponding to), 500 pons." These payments, if made, would reduce the debt by 2,000 pons.

The satisfaction of the balance which might include 500 pons of principal money, was left to be made by an adjustment of accounts. The deed goes on thus: "and in the year Pramadhi, corresponding to 1819-20, a settlement of the accounts of the receipts and disbursements shall be made, and any amount that may be due after deducting payments out of the principal and interest as aforesaid, we undertake to pay in cash in full on the 30 Panguni of the said year (corresponding to the), and to redeem the mortgage." The obligation, therefore, to pay the balance before a day fixed, was

not to attach until that balance should have been ascertained by an account, in which the mortgagee was necessarily to be the accounting party. And what was to be the consequence of the breach of this obligation if it did attach? Not that thereupon that which was a mortgage in its inception was to become an absolute sale as from the beginning, finally closing the transaction between the parties, as in the case of an ordinary mortgage by conditional sale; but that the land should be valued at so much per veli; that the mortgagee should become the purchaser at that rate of so much of it as would satisfy the balance due to him, taking the whole if such balance amounted to 1,269 pons and $3\frac{3}{4}$ fanams, but retaining his right to sue the mortgagors personally for any final balance of the original debt and interest that might remain due after the completion of that purchase.

It is admitted that the mortgagors never paid any of the several instalments of 500 pous, and Mr. Mayne called upon their Lordships therefore to presume that on the 9th of April, 1820, at least the sum of 1,269 pous remained due. But, on the other hand, it has been found by the Lower Court, and it is admitted in the Appellants' case, that no settlement of accounts took place in 1820, or subsequently thereto. Their Lordships are therefore of opinion that this case (the security not being a mortgage by conditional sale) stands clear of the decision in the 13 Moore's I. A.; and, further, that there is no reason for presuming, even at this distance of time, that the very special agreement contained in the deed of the 2nd of July for the purchase of the property in certain events was carried out between the parties according to its terms, the contemplated settlement of accounts being a necessary preliminary to the performance of that contract. Indeed, the Appellants have not distinctly rested their case on any such presumption.

The conclusion at which their Lordships have thus arrived being of itself sufficient to determine this appeal, it is not absolutely necessary for them to consider the second of the questions raised concerning the decision in the 13 Moore's I. A. The great importance, however, of the principles involved in that question induces them to notice it.

The passage of the Judgment in the case of

Pattabhiramier *v.* Vencatarow Naicken, which seems to have led the Courts of India, in some of the cases which will be afterwards cited, to the belief that it had not that binding force upon them which an unqualified ruling of this tribunal of ultimate resort would unquestionably possess, is in these words: "It must not then be supposed that, in allowing this Appeal, their Lordships design to disturb any rule of property established by judicial decisions so as to form part of the law of the forum, wherever such may prevail, or to affect any title founded thereon." In order, then, to see how far this reservation, taken in its fullest sense, can qualify the effect of the Judgment, it is necessary to consider what has been the course of decision upon mortgages by conditional sale in the Courts of Madras.

Mr. Mayne has shown that up to 1858 the decisions of the late Sudder Court of Madras were, with one exception, perfectly consistent with that of this Board in Pattabhiramier's case. Indeed, this is almost admitted in the Judgment of the High Court of Madras of the 11th of December, 1871, which will be afterwards referred to. But in 1858 the current of decision seems suddenly to have turned. In the Case No. 49 of 1858, decided on the 28th of August in that year (Madras Sudder Adawlut Decisions for 1858, p. 142), the Judges said: "The Court observes that the transaction was a loan of money on the security of certain property, and that the established practice of the Courts of Equity in England is to recognize in the mortgagor a right of redemption, notwithstanding that the time stipulated for foreclosure may have passed by, and they do so on the ground that the repayment to the mortgagee of the money lent by him, with interest, is an equitable discharge of his claims. The Court of Sudder Adawlut recognizes the justice of this principle. They remark that there is an obvious distinction between a conditional sale with power to redeem and a mortgage. The parties in the first instance fix a value on the property, and the transaction is a true arrangement for the sale thereof for such consideration. In the latter instance, a sum is borrowed not representing the value of the property, and it may be far within such value, the only care being that the property shall be of such value as will

cover the loan by way of security. It is therefore strictly equitable that, on the failure to pay off the loan by the time stipulated, the lender should fall back upon the security, not to absorb the whole, but to take his money out of it. The clause of forfeiture in a mortgage deed the Court view as introduced *in terrorem*, by way of a penalty, and it is not the practice of the Court of Equity to enforce penalties. They merely accord to the several parties their just and equitable rights, ascertained on consideration of the value that has passed from the one to the other, and which has to be recovered back."

It appears, then, that the Judges of the late Sudr Court in 1858 took upon themselves, in contravention of the law of India, as declared and enforced by the decisions of their predecessors, to apply to this class of security for the first time the principles which the English Courts of Equity have for centuries applied to mortgages in this country. It would seem, however, that they did not adopt those principles in their integrity, since they treated the stipulation in favour of the mortgagee as a mere penalty, and made no provision for his getting the benefit of it by the machinery of a foreclosure suit. They apparently contemplated no remedy against the mortgaged property but that of sale.

This case was followed by the late Sudr Court, notwithstanding the vigorous and well reasoned protest of one of its Judges (Mr. Morehead), which is to be found at page 150 of the S. A. D. for 1859, in three cases decided in 1859, and in three more, of which one was the very case of Pattabhiramier, decided in 1860. And so the course of decision in the Courts of Madras stood when special leave to appeal was granted in Pattabhiramier's case by this Board in April 1861. Now, if that Appeal had been prosecuted without delay, and those who constituted the Committee that heard it had had before them all the cases in favour of the Decree which had then been decided in the Madras Court, their Lordships believe that the Committee would nevertheless have allowed the Appeal, and, so far from treating those cases as establishing a course of practice inconsistent with that which had previously prevailed, would have overruled them as decided on erroneous principles.

It unfortunately happened, however, that the Appeal slept for nine years, and that in the interval

the Sudr Court, and afterwards the High Court which succeeded it, continued the course of decision which the former had begun in 1858. This appears by the judgments of the High Court in 1 M. H. C. R., p. 460; 2 M. H. C. R., 420; and 7 M. H. C. R., p. 6. In the first of these cases Chief Justice Scotland recognized the mortgagee's right to a Decree for foreclosure, which does not seem to have been admitted by the earlier Decrees. In the second the Judges treated the law as settled in almost absolute conformity with that administered by the Court of Chancery; observing, however, that in India, as in England, there may be sales with a condition for re-purchase within a fixed time, against the breach of which equity will not relieve. On this point they said, "it is the intention of the parties which governs, and that intention may be shown by the deed itself, by other instruments, or even by oral evidence." In the last case the Judges held that the security in question was one of the latter class, and accordingly gave effect to it according to its strict tenor. But, in giving their judgment, which was delivered late in December, 1871, they took occasion to say, of the case in the 13 Moore's I. A.:—

"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 Sudder 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 Sudder Court intended to follow, and have held the question to be one of construction, admitting, however, for the purposes of the construction, other documents, and oral evidence."

A similar alteration by judicial decisions of the antecedent law seems to have been effected at Bombay, though at a later period. In the case No. 608 of 1871, reported 9 Bomb. H. C. R., p. 69, Westropp, C. J., reviews the law and its changes both at Madras and Bombay. He states that the change in the latter Presidency dates only from 1864, when the case of Ranji *v.* Chinto, 1 Bomb. H. C. R., p. 199, was decided. And the Chief Justice observes: "The recognition of the right to

redeem was, having regard to the previous decisions of the Sudder Adalut, perhaps somewhat a strong measure. It had, however, for a long time previously, been considered a desirable course to adopt, and eminent Judges of the High Court, who had formerly been Judges of the S. A., regretted that their predecessors had, for the most part, enforced the conditions for purchase in *gahan lahan* mortgages, as such a course had been found to promote most oppressive and grasping conduct on the part of money-lenders in the Mofussil." It would be difficult to have a more candid admission of the assumption by the Courts of the functions of the Legislature. This case also shows that the Bombay as well as the Madras Court has come to the conclusion that the modern course of decison is to prevail against that of this Committee in Pattabhiramier's case.

The next case reported in this volume, No. 85 of 1871, rules that the right of redemption subsists, and will be enforced, although any number of years may have elapsed since the mortgagee's title, under the terms of the deed, would have become absolute, unless the right to redemption is barred by the 15th clause of Section 1 of the Limitation Act XIV of 1859.

It appears to their Lordships that this action of the Courts of the Minor Presidencies is open to grave objection; not only because in so altering the existing law they usurped the functions of the Legislature, but also because the change, as effected, involved very mischievous consequences. Under the law as laid down by them, persons who fifty years before had acquired, as the law then stood, an indefeasible title in lands, which they had ever since held and enjoyed *in optimâ fide*, became liable to be dispossessed, and compelled to account for mesne profits at the suit of the representatives of a mortgagor against whom the sixty years' rule of limitation had not yet run. Nor is this an imaginary case. In the latest decision cited at the Bar (No. 551 of 1874, 7 Madras H. C. R. 395), the mortgage deed was executed in 1811, the title of the mortgagee became absolute in 1816; there had been since 1811 uninterrupted possession by him, or by a purchaser from him; and the suit to redeem must have been brought but just within the sixty

years' period of limitation. The Reports show that other instances of similar disturbance of title have occurred, and more may occur.

Again, the distinction between sales with a condition for repurchase, and mortgages by conditional sale, is made to depend upon the intention of the parties to the original transaction proveable, if need be, by oral evidence. This seems to open a wide field of litigation, and to leave much to the discretion of the Judge in each particular case; and the inquiry is embarrassed by the circumstance that the parties whose intention is to be ascertained cannot, in the case of an ancient transaction, have contracted with reference to a state of law which the Courts of Madras have decided no longer exists.

In Bengal, where the possible mischiefs that might result from leaving mortgages by conditional sale to take effect according to their tenor early became apparent, the Legislature proceeded on sound principles to apply a remedy. By Regulation I of 1798 it gave the mortgagor the means of avoiding any dispute as to tender, and of keeping alive his right of redemption by a payment into Court.

By Regulation XVII of 1806, it made provision for redemption and judicial foreclosure by the procedure still in use. But this Regulation, as was properly decided in the case of Sarcefoonissa *v.* Shaikh Enayet Hossein, 6 W. Rep. 88, had not a retrospective operation upon titles which had become absolute before it came into force. The contrast between this mode of proceeding and that followed by the Courts in Madras and Bombay, is obvious.

The state of the authorities being such as has been described, it may obviously become a question with this Committee in future cases, whether they will follow the decision in the 13th Moore, which appears to them based upon sound principles, or the new course of decision that has sprung up at Madras and Bombay, which appears to them to have been, in its origin, radically unsound.

On a stale claim to redeem a mortgage, and dispossess a mortgagee who had, before 1858, acquired an absolute title, there would be strong reasons for adopting the former course. In the case of a security, executed since 1858, there would be strong reasons for recognizing and giving effect to the

Madras authorities, with reference to which the parties might be supposed to have contracted. Their Lordships abstain from expressing any opinion upon this question until the necessity for determining it shall arise. They deem it right, however, to observe that this state of the law is eminently unsatisfactory, and one which seems to call for the interposition of the Legislature.

An Act affirming the right of the mortgagor to redeem until foreclosure by a judicial proceeding, and giving to the mortgagee the means of obtaining such a foreclosure, with a reservation in favour of mortgagees whose titles, under the law as understood before 1858, had become absolute before a date to be fixed by the Act, would probably settle the law, without injustice to any party.

In the present case, their Lordships can only recommend Her Majesty to affirm the Decree under Appeal, and to dismiss this Appeal with costs.

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