Privy Council Appeal No. 12 *of* 1915.

Haji Mahomed Eusop bin Aboo Bakar, since deceased (now represented by Haji Abdul Rahman and Another) - - - - *Appellant,*

v.

Mahomed Hassan bin Abdul Latib - - - *Respondent,*

FROM

THE COURT OF APPEAL FOR THE FEDERATED MALAY STATES AT KUALA LUMPUR.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 19TH FEBRUARY, 1917.

Present at the Hearing:

LORD BUCKMASTER.
LORD DUNEDIN.
LORD PARMOOR.
SIR WALTER PHILLIMORE, BART.

[*Delivered by* LORD DUNEDIN.]

In this suit the plaintiff, Haji Mohamed Eusop-bin-Aboo Bakar, claimed to be entitled as against the defendant, Mohamed Hassan-bin-Abdul Latib, to a piece of land in Kuala Lumpur, held under Certificate of Title 626. The land originally belonged to a Mr. Keyser, who, in 1893, through his attorney, sold it to the plaintiff, and the land was transferred to the plaintiff in August 1894. The plaintiff had originally paid for the land by granting a promissory note in favour of Mr. Keyser's attorney. The plaintiff, being unable to discharge the note, the defendant consented to become surety for him, and for the promissory note of the plaintiff there was substituted a joint note of the plaintiff and defendant. In February 1895 the joint note was discharged by the defendant, who paid up the amount due on principal and interest. At the same time the defendant paid off the amount due by the plaintiff upon two decrees. The total advances thus made by the defendant to the plaintiff amounted to 1,180·20 dollars. On the 1st March, 1895, the plaintiff transferred the land to the defendant by a registered transfer for the consideration of

1,180·20 dollars, and upon the same date the parties executed the following agreement :—

"This agreement made the 1st day of March in the year 1895, between Mohamed Hassan-bin-Abdul Latib, of Kuala Lumpur, broker, of the one part, and Hadji Mohamed Eusop-bin-Aboo Bakar, also of Kuala Lampur, merchant, of the other part; Whereas the said Mohamed Hassan is justly indebted unto the said Hadji Mohamed Eusop in the sum of 1,180 dols. 20 c., which he is unable to pay at present; And whereas for securing the repayment of the said sum of 1,180 dols. 20 c., he, the said Mohamed Hassan, has this day transfersed unto the said Hadji Mohamed Eusop his land at Batu Road in Kuala Lumpur, comprised in Certificate of Title No. 626, containing an area of 3 roods and 21·7 perches.

"Now the condition of this agreement is such that if the said Mohamed Hassan shall within six calendar months from the date hereof pay unto the said Hadji Mohamed Eusop or his executors or administrators, the said sum of 1,180 dols. 20 c., together with interest thereon from the date hereof at the rate of 18 per cent. per annum, plus the sum of 33 dols. 90 c., being the cost of drawing this agreement and the transfer above named, including stamp and registration fees, then the said Hadji Mohamed Eusop shall at the cost of the said Mohamed Hassan reconvey the said land so described above unto the said Mohamed Hassan free from incumbrances, otherwise this agreement shall become null and void and of no effect."

The agreement was duly signed and sealed. Since that date the defendant, who had obtained registration under the document of transfer, has remained the registered owner of the land. The plaintiff in his pleadings, *inter alia*, averred adverse possession of the land, but this, as a fact, was found against him and need be no longer referred to. The defendant denied that he had executed the agreement; the plaintiff swore he had repaid the money; both these averments were false. It is enough to cite one sentence from the judgment of Mr. Justice Innis, before whom the action depended: "His" (the plaintiff's) "fatuous mendacity in insisting that he had paid it by that date almost parallels that employed by the defendant in his repudiation of the execution of the agreement." No reliance can be placed on the word of either party, but the documents speak for themselves. The learned Judge found as a fact that the agreement was executed by the defendant, and that the plaintiff never paid the money. These two facts being held as proved, as to which there is not a shadow of doubt, there is fortunately no occasion to rely on the testimony of either party. The question remains one of law alone.

Payment being negatived, the claim of the plaintiff was confined to asking a declaration that he was still entitled to redeem the land, and that after enquiry as to the amount of the debt with interest, and upon payment of the sum due, the plaintiff should be entitled to a reconveyance. This relief was granted by the trial Judge, and his judgment was affirmed by the majority of the Court of Appeal. Against these judgments the present appeal was taken. The defendant having died, his legal representatives were substituted for him in the appeal.

Before the trial Judge the argument of parties seems to have been as follows: The plaintiff argued that the agreement, on a proper construction, proved that what was *ex facie* an out-and-out transfer, evidenced by the registered title, was in reality only a conveyance in security, and that he was, therefore, entitled, on paying the debt, to get a reconveyance of the land. To this the defendant made several replies. First, he said that on a true construction, the agreement showed, not a conveyance in security, but a transfer with a conditional contract for resale, a *pactum de retrovendendo*, and that payment not having been made within the time stipulated there was no obligation to reconvey. He also pled that, if the agreement on construction showed a conveyance in security, then it was null and void in terms of Section 4 of the Titles to Land Registration Act of 1891. He also pled that any action founded on the agreement was barred by the limitation enactment of 1896.

The learned trial Judge in his judgment examines at some length the cases which have been decided in England and which go to affirm the proposition which is expressed in the brocard, "Once a mortgage always a mortgage," and comes to the conclusion that the agreement in question on a proper construction shows that the transaction was one of conveyance in security, and not of transfer with appended *pactum de retrovendendo*. To this view he has the adherence of the majority of two learned Judges of the Court of Appeal. The dissenting Judge, Woodward, J., in the Court of Appeal, thought that the agreement was a *pactum de retrovendendo* conditioned by payment within the stipulated time of six months.

In the view that their Lordships take of this case it is unnecessary to decide this question, and they assume, without deciding, that the construction put upon the particular document by the majority of the learned Judges is the correct one. The next point, therefore, comes to be whether the agreement, if shewing a conveyance in security, is null and void in respect of Section 4 of "The Registration of Titles Act, 1891." The land system of the State of Selangor, in which the land in dispute is situated, is a system of registration of title modelled on the well-known Torrens system of Australia. It is unnecessary to describe it in detail: the law thereupon is contained in the Act cited, which forms a code on the subject. Section 4 is as follows:—

"After the coming into operation of this Regulation, all land which is comprised in any grant . . . . whether issued prior or subsequent to the coming into operation of this Regulation, shall be subject to this Regulation and shall not be capable of being transferred, transmitted, mortgaged, charged, or otherwise dealt with except in accordance with the provisions of this Regulation, and every attempt to transfer, transmit, mortgage, charge, or otherwise deal with the same, except as aforesaid, shall be null and void and of none effect, and in particular the provisions of Part VII relating to the enforcement of charges shall extend and apply to mortgages of land which have been executed

before the coming into operation of this Regulation so that the powers in such mortgages mentioned shall only be exercisable in accordance with the provisions of Part VII, or as near thereto as circumstances admit."

In Part VII, dealing with purchases, Section 41 is as follows :—

"Whenever any land is intended to be charged or made security in favour of any person, the proprietor shall execute a charge in the form contained in schedule E, which must be registered as hereinbefore provided."

Now the agreement under discussion was not in the form of schedule E, and therefore could not be and was not registered. It is therefore clear that it conferred no real right in the land, which remained after the transfer duly registered as the unburdened property of the defendant. But when that is said Section 4 has no further application. It does not profess to prohibit and strike at contracts in reference to land, provided that such contracts cannot be construed as attempting to transfer, transmit, mortgage, charge, or otherwise deal with the land itself. In other words, it is contracts or conveyances which, but for the section, might be held to create real rights in a party to the contract or conveyance, which alone are struck at. This view was taken by the learned trial Judge, who says :—

"The dealing with the land in question is effected by two instruments. The first is the registered transfer as to which no exception can be taken. The second is the unregistered agreement Exhibit E. But what is that document? It is an agreement on the part of the defendant to transfer to plaintiff the land upon a certain contingency happening—in other words, an executory agreement. It is in fact an agreement to do something in the way sanctioned by the law. It is not an attempt to transfer, but a conditional promise to transfer. Mr. Rogers contended that these Courts have never held that such an instrument came within the scope of Section 4 of the Regulation, and I am in complete agreement with him on that point."

This is substantially concurred in by the majority of the Court of Appeal, though their opinions are expressed in somewhat different words. Their Lordships think that this view is sound. The agreement is valueless as a transfer or burdening instrument, but it is good as a contract.

This, however, directly raises the plea based on the Limitation Act, and on this point unfortunately there seems to have been but little consideration in the Courts below. The Limitation Act of 1896 is framed upon the model of and in many instances textually reproduces the Indian Limitation Act. The operative part, Section 4, is as follows :—

"Subject to the provisions contained in Sections 5 to 25 (inclusive), every suit instituted after the period of limitation prescribed therefore by the second schedule hereto shall be dismissed, provided that limitation has been set up as a defence."

The provisions of Sections 5 to 25 have no reference to any matter here relevant. The whole point arises under the second schedule. Now the schedule provides different periods of limitation and consists of 116 articles. The periods of limitation vary from 1 year, the shortest, to 60 years, the longest. Apart from one provision as to pawns, or deposits, for which the period is 30 years, the next longest period to the 60 years is 12 years. The present suit was begun more than 12 years after the transaction in question. It is, therefore, barred under all categories, except those as to which the period of 60 years is applicable. Accordingly, it is to article 115 of the schedule that the learned Judges refer this. That runs as follows :—

"115. Against a mortgagee to redeem or to recover possession of immovable property mortgaged."

The question, therefore is, Who is a mortgagee and what is property mortgaged in the sense of the schedule ? The learned Judge, after the passage already quoted as to the effect of Section 4, proceeds as follows :—

"My decision, then, upon the second issue" (the second issue being, "Is the agreement of the 1st March, 1895, valid as a mortgage or otherwise ?") "is that the agreement of the 1st March, 1895, is a valid agreement and, taken with the transfer, shows this transaction to have been for the purpose of securing a debt. It is in this sense that I have in this judgment used the term 'mortgage.' I have done so for convenience' sake, though in this country, fortunately for its inhabitants, the mortgage of immovable property, as understood in England—a transaction which, as Lord Macnaghten said in *Samuel* v. *Jarrah Timber and Woodcutting Corporation*, cited above, no one ever understood by the light of nature —does not exist.

"The answer to the third issue" (the third issue being, "Is plaintiff's claim for a transfer of the land by defendant barred by 'The Limitation Enactment, 1896'?") "is 'No,' as the period of limitation is sixty years."

In other words, having specially said that this agreement is not a mortgage in the proper sense of the word, he proceeds to assume rather than to argue that "mortgage" in the schedule must include any arrangement whereby land is held in security for debt. The learned Chief Judicial Commissioner says with equal brevity :—

"Upon this it seems to me sufficient to say that, the right of redemption being established and the suit being brought within the period allowed by article 115 of the Limitation of Suits Enactment, the plaintiff cannot be debarred of relief on the ground of delay."

And Mr. Justice Edmonds says :—

"Another ground of appeal is that the agreement was an executory agreement, and that any action upon the contract should be brought within the period of limitation provided for. Though the learned Judge did analyse the transaction, it is quite clear to my mind that his decision was given on the ground that the transaction had to be regarded as a whole. Whether an equity of redemption should more properly be regarded as a contract or a trust, the period of limitation within which a mortgagor can enforce it is declared by the Limitation Enactment to be sixty years."

It seems to their Lordships that the learned Judges, in these observations, have been too much swayed by the doctrines of English equity, and not paid sufficient attention to the fact that they were here dealing with a totally different land law, namely, a system of registration of title contained in a codifying enactment. The very phrase, "equity of redemption," is quite inapplicable in the circumstances. There is no provision in the code for mortgages apart from what is described as a "charge"; indeed, they are, except as regards those of the past, *de facto* abolished after the date of the enactment by Section 4 already quoted. That provides for charges, which must be made in a statutory form and must appear on the register to be effective. Under such a system the right to the land remains with the registered owner. He has nothing to redeem, his right on paying the debt being to have the charge cleared off the register. It is true that, in spite of this, the schedule uses the words "mortgagee" and "mortgage," and they must be given effect to. In the opinion of their Lordships, this effect must not be given by loosely construing the word "mortgage" as meaning any transaction which results in land being transferred in security of debt as opposed to sale or other contract or right which eventuates in out-and-out conveyance. On the contrary, in their view, the relationship of mortgagor and mortgagee, when referred to in the schedule, is, in connection with transactions since the date of the Registration Act, confined to such relationship as is recognised by the Registration Act, and can therefore only be constituted by and under a proper registered charge. It follows that the right to sue under the agreement, which in this case was the only right in the plaintiff, is not preserved under article 115 of the schedule of the Limitation Enactment Act, and is consequently barred by the general provisions of the Act.

Their Lordships will, therefore, humbly advise His Majesty that the appeal should be allowed, the judgments of the Courts below reversed, and the suit dismissed with costs, both here and in the Courts below.

In the Privy Council.

HAJI MAHOMED EUSOP BIN ABOO BAKAR

v.

MAHOMED HASSAN BIN ABDUL LATIB.

DELIVERED BY LORD DUNEDIN.

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