
(1918) 04 MAD CK 0036
In the Madras High Court

Meenakshisundara Mudaliar alias Thyagaraja Mudaliar and
Vaithilinga Pillai

APPELLANT

Vs

Rathnasami Pillai

RESPONDENT

Date of Decision : 02-04-1918

Acts Referred:

Transfer of Property Act, 1882 — Section 58

Citation : (1918) ILR (Mad) 959 : (1918) 8 LW 438 : (1918) 35 MLJ 489

Hon'ble Judges : Seshagiri Aiyar, J;Abdur Rahim, J

Bench : Full Bench

Judgement

Abdur Rahim, J.—The defendants in the suit have appealed from a decree of the Subordinate Judge of Kumbakonam by which he directed

specific performance of an agreement (Exhibit A) executed by the 1st defendant on 31st October 1914 in favour of the plaintiff. The first point

taken is that the transaction in question was an agreement to grant a lease and as it was not registered it could not be specifically enforced. The

second and alternative objection to the decree, is that supposing it to be an agreement to execute a mortgage as found by the Subordinate Judge,

even then all that the plaintiff will be entitled to would be damages and not a decree for specific performance.

2. As regards the first question we have been referred to a number of decisions some of which seem to be inconsistent with the others, but it is not

necessary to discuss them in any detail. In none of these cases, the question arose with reference to the application of the Registration Act. In most

of , them the nature of the transaction had to be considered in connection with the provisions of the Stamp Act or the Limitation Act, That a

transaction may combine the features partly of a lease and partly of a mortgage,

does not admit of any dispute. That seems to be the nature of what is known as the Zuri Peshgi lease in Northern India or a kanom in Malabar Vide Bengal Indigo Company v. Roghobar Das ILR (1896) Cal. 272, Nellaya Variyathsilapani v. Vadakiyat Manakal Ashtamurthi ILR (1880) Mad. 382 and Gopalan Nair v. Kunhan Menon ILR (1907) Mad. 300.

The Stamp Act contemplates and provides (a) for an instrument comprising or relating to several distinct matters (Section 5) and (b) for an instrument so framed as to come within two or more of the descriptions of transactions on which duty is payable under the Act. We are not concerned in this case with an instrument of the first class. The question is whether Exhibit A is an agreement for the execution of an instrument which would fall within the definition both of a mortgage and a lease, or only of one of such transactions. Supposing it is the former, if the question were as to the duty payable, the Stamp Act provides a simple answer. But the matter involves obvious difficulties when the question arises as to the application of the Limitation Act or the Registration Act to such transactions. For then we have to find out the exact nature of the transaction taken as a whole before it can be ascertained which particular article of the Limitation Act is applicable or whether the document is compulsorily registrable or not. The solution in my opinion has to be sought in what was the intention of the parties, whether the transaction was intended to be a lease or a mortgage. This is the principle to be deduced from the rulings. In Nellaya Vartyath Silapani v Vadakiyat Manakel Ashtamurthi I.L.R. (1880) Mad. 382, a Pull Bench of five Judges of this Court laid down that the question whether a kanom was to be regarded as a lease or a mortgage depended upon the object for which the tenure was created. There the question arose with reference to limitation. The learned Judges observed, ""In some cases it (that is, the kanom) may be a mere lease, a sum being advanced as security for the rent or for proper cultivation, to be repaid on the expiry of the term. In other cases, and most frequently, it is created as a lease by way of mortgage to secure a loan advanced to the jenmi (proprietor). * * * * The Limitation Act has no provision specially applicable to tenures of a mixed character, * * * * For the purposes of limitation when, as is alleged in the case before us, it is intended as a mortgage, we must apply to it the law of limitation applicable to mortgages. In

Tukaram, v. Ramchand ILR (1901) Bom. 252, which was a Full Bench decision of the Bombay High Court, the question was raised with

reference to a claim for redemption and the principle applied was what was intended by the parties to the transaction, That intentio I has to be

gathered mainly from the internal evidence furnished by the document itself with such light as may be derived: from the surrounding circumstances in

which the transaction had its birth. The essential test to be applied to such cases is whether by the transaction in question the debt was secured or

satisfied ; If the former, it Would be a mortgage, otherwise a lease. This seems to be the "ratio decidendi of another Full Bench ruling of this Court

in Reference under Stamp Act. ILR (1889) Mad. 203 Mr. A. Krishnaswami Aiyar, the learned Vakil for the appellants, relied upon a recent ruling

of a Division Bench in Kammara Peda Subbayya v. Kararha Chennappa (1914) 28 M.L.J. 303. In that case the learned Judges accepted the

principle laid down by the Full Bench in Reference under Stamp Act ILR (1883) Mad. 203 and whether their interpretation of the particular

documents which they had to consider was correct or not, that is not a matter with which we are concerned.

3. The document in question in the present suit provides that the 1st defendant is to execute in favour of the plaintiff a swamibogam for twenty

years from 1st May 1915 on receiving from him Rs. 5,000, that the entire amount including the interest thereon shall be realized by enjoyment of

the swamibogam, and that the plaintiff should pay the 1st defendant 100 kalams of paddy, Rs. 300 in cash and 300 bundles of straw every year

and at the expiry of twenty years deliver the land to the 1st defendant. The document also stipulates that if there be a delay in payment, a sum of

Rs. 750 is to be added to the amount payable and that the plaintiff is to supply labour of 50 workman every year. It concludes with a provision that

if the Rs. 5,000 be paid at the end of 8 years, the plaintiff must receive it and give up possession of the properties and the deed will be cancelled. It

was not suggested by any one at the bar that in this case there were two distinct matters, a lease and a mortgage embodied in one document. The

transaction is either a lease or a mortgage and for purposes of the Registration Act must be treated as one document. In my opinion, the intention

of the parties was to secure a debt and not to satisfy it, within the meaning of Reference under Stamp Act ILR (1883) Mad. 203, No doubt there

is a stipulation for the payment of a fixed quantity of paddy and money to the 1st defendant, but even here the word "rent" is not used. There is also provision for the supply of labour which is an unusual term in a mortgage. But the rest of the provision's clearly show that the parties contemplated a security. The benefit to be derived by the plaintiff is in so many words said to be by way of interest, and the last clause of the document provides that the 1st defendant may redeem the property by the payment of the amount borrowed at the end of 8 years. It has been argued that the transaction does not fall within the definition of an usufructuary mortgage as given in S, 58 of the Transfer of Property Act, but the Act clearly contemplates mortgages other than those defined in the Act. I hold, therefore, that Exhibit A is an agreement to grant a mortgage and as such does not require registration.

4. Then, was the Lower Court right in decreeing specific performance of this agreement, or is the proper remedy of the plaintiff by way of

damages? It is settled law that the Court will not specifically enforce an agreement to lend or to borrow money whether on security or not see

Rogers v. Challis (1859) 27 Beav. 175 Sichel v. Mosenthal (1862) 30 Beav. 371, and Larios v. Bonany Gurety (1878) L.R. 5 P.C 346, But

specific performance was ordered in Ashton v. Corrigan (1871) L.R. 13 Eq. Cas. 76 , and in Hermann v, Hodges, s where the money had

actually been advanced and all that remained to be done was the execution of the mortgage agreed upon. In Ashton v. Corrigan (1871) L.R. 13

Eq. Cas. 76, Sir John Wickens, V.C. said, ""I doubt whether a contract to execute a mortgage, which the mortgagee may enforce by a sale the day

after its execution, is one which the Court will specifically perform; and I know of no reported case in which such relief has been given where the

right to it has been contested. However, on the authority of the cases cited from Seton on Decrees, I will make the decree,"" In Hermann v, Hodges

(1873) L.R. 16 Eq Cas. 18, where the defendant did not oppose the decree, Lord Selborne, L.C., said that he had no doubt of the propriety of

making the decree asked for, unless the defendant was prepared to pay off the advance at once. Both were cases in which, so far as one can

gather, the entire amount had been advanced. That is also how the scope of the rulings is stated in Fry's Specific Performance (5th Edition),

Section 54, page 24, and Halsbury's Laws of England, Vol. 27, Section 125, page 73 and Volume 21, Section 135, page 75. The question then

is whether specific performance can be decreed where only a part of the advance has been made. In the last reference it is stated in the foot-note

that in an Irish case. *Hunter v. Langford* (1828) 2 Mol. 272, specific performance was ordered of an agreement ,to grant a mortgage for an

amount of ₹ 30,000 of which ₹ 1,000 was already advanced. But this report has not -been available to me. In *Bass v. Clivley* (1829) 48 E.R.

33, where the plaintiff had agreed to advance ₹ 3,000 and actually advanced ₹ 600 in part, the defendant apparently submitted to a decree

for specific performance according to the terms of the contract. It cannot be said that the question, whether a contract to lend money on security

can be specifically enforced if only part of the amount to be lent had been advanced, was considered and decided by the Master of the Rolls.

5. On the other hand, there is the decision of the Court of Appeal of England 1897 I .Q.B. 692 and the House of Lords in *South African*

Territories v. Wallington (1898) A.C. 309 where the defendant had applied for and paid 10 per cent. deposit on some debentures, it was held that

the Company was not entitled to a decree directing the defendant to pay rest of the instalments according to agreement. In the Court of Appeal,

Lord Justice Chitty observed," It is clear that no specific performance of a contract to lend and borrow money can be granted at the suit either of

the proposed lender or the proposed borrower. It is immaterial whether the loan is to be on security or without security, or whether the loan is to

be for a fixed period; and it can make no difference whether the loan is to be made in one sum or by instalments." This view of the law was

confirmed by the House of Lords. No doubt the decree passed by Wright, J. which was in question in the appeal was rather peculiar. It did not in

so many words grant specific performance, but gave a decree for the entire amount unpaid, and one of the arguments advanced in support of the

decree was that the contract was for purchase of debentures on certain terms. But Sir Eobert Reid, afterwards Lord Loreburn, also argued, that if

the respondent had paid all the instalments and the debentures had been withheld, the respondent would be entitled to specific performance and

the remedy must be mutual. The learned Lords, however, did not think that specific performance could be extended to a case like the one before

them where only part of the advance had been made. The principle of the decision of the House of Lords in *South African Territories v. Wallington*

(1898) A.C. 309, and the other English cases, has been followed in this Court in *Rajagopala Aiyar v. Sheik Davood Rowther* (1917) 34 M.L.J.

342, to which I was a party, and in *Sheikh Galimn v. Sadarjan Bibi* ILR (1915) Cal. 59. In all those cases, however, the suit was by the borrower.

The general rule of English Law which in these cases is followed in India is not that the Courts will compel performance of contracts according to

their tenor ; on the other hand, the proper remedy according to English Common Law for the breach of a contract is compensation by way of

damages for the loss arising from the breach. The Courts of Equity however assumed jurisdiction to compel the defaulting party to carry out the

contract in its terms, in a class of cases where damages would not be an adequate remedy. Hence one of the conditions for the exercise of this

equitable jurisdiction has always been that the common law remedy should be inadequate. Section 21 of the Indian Specific Relief Act therefore

says that a contract for the non-performance of which compensation in money is an adequate relief, cannot be specifically enforced. An ordinary

contract to lend or borrow money whether on security or otherwise comes within this category. But supposing money has already been advanced

and " the borrower refuses to execute a mortgage according to the agreement, the lender would apparently be prejudiced if the loan were to

remain without security, and it is difficult to see what difference it would make in this respect whether the entire loan had been advanced or only a

portion, if in the latter case the lender has been ready and willing to advance the remaining sum according to the agreement. On the other hand if

the loan was liable to be repaid at once and the borrower is willing to pay it off, there would be no object in decreeing specific performance in such

a case. Hence it was that Lord Selbourne in *Hermann v. Hodges* (1873) L.R. Eq. Cas. 18, said that he would not decree specific performance of

an agreement to borrow on a mortgage if the defendant was prepared to pay off the advance at once. If the loan was not repayable for a certain

period that would only affect the amount of damages and the method of calculation. The Courts of Equity seem to be reluctant to force upon a man

the position of a debtor if he is in a position to pay off the loan, though no doubt he will be made to compensate the other party for breach of the

agreement. This seems to me to be the result of the authorities. Where, however, the borrower is not prepared to pay off the loan, to refuse

specific performance in such a case of the agreement to execute a mortgage would be, as I have said, denying justice. In Halsbury's Laws of

England, Vol. 21, page 75, it is stated, "In equity a mortgage is created by a contract to execute, when required a legal mortgage, or by a contract

that certain property shall stand as security for a certain sum. The agreement may be enforced according to its terms, even though the legal

mortgage when executed will confer on the mortgagee an immediate power of sale." This is supported by a number of decisions of the English

Courts. The case, however, is to be distinguished where no money has actually been advanced, for there would be no question there of an

equitable mortgage. In India except in the Presidency Towns equitable mortgages are hardly recognized and it was argued by Mr. A.

Krishnaswami Aiyar that if we accepted the proposition laid down by the House of Lords in *South African Territories v. Wallington* (1898) A.C.

309 in cases where the suit is by the borrower, the doctrine of mutuality required that the rule should be equally followed where the suit is by the

lender. The two cases do not stand on the same footing. In the last case the lender would have altered his position and his money may be lost if

specific performance were not decreed, while in the other case the only question would be one of damages. Besides, if the doctrine of mutuality

were strictly applied to these cases, there could be no specific performance even when the entire amount had been advanced, but none of the

learned Lords in their judgments in the above mentioned case suggested any doubt as to the decisions in *Hermann v. Hodges* (1873) L.R. 16 Eq.

Cas. 18 and *Ashton v. Corigan* (1871) L.R. 13 Eq. Cas. 76 which were cited at the bar, and the text-writers mention these cases with apparent

approval.

6. The plaintiff has already paid about Rs. 4,250 to the 1st defendant out of the Rs. 5,000 which he agreed to advance, and Mr. A. Krishnaswami

Aiyar has offered on behalf of the 1st defendant to pay up the amount though his client was not willing or prepared to do so in the Court of First

Instance. On payment by the 1st defendant of this amount with profit thereon according to the terms of Exhibit A to be ascertained by the Lower

Court within 4 months after the re-opening of the said Court, the decree for specific performance will be set aside, and the Lower Court will be directed to ascertain the damages sustained by the plaintiff by reason of the breach of the contract and pass a decree accordingly. The plaintiff must either produce an acquaintance in respect of the amount payable under the promissory note in favour of Krishna Mudaliar within the period specified above or execute a bond of indemnity in favour of the 1st defendant. Failing either, the amount payable under the abovementioned promissory note will be deducted from the amount payable to the plaintiff. In default of such payment the decree of the Subordinate Judge will be confirmed and the appeal dismissed. The appellants must pay the costs of the respondent up till now in this Court and the Lower Court. Future costs, if any, will be disposed of by the Subordinate Judge.

Seshagiri Aiyar, J.

7. I have come to the same conclusion.

8. On the 31st of October 1914 the 1st defendant entered into an agreement with the plaintiff to execute a deed of Swamibogam of the properties in suit. Rs. 250 was paid on that day and the balance of Rs. 4,750 was agreed to be paid on the execution of the document, which was to be on the 15th of April 1915. Subsequent to the agreement, at the request of the defendant, plaintiff agreed to pay a sum of Rs. 2,000 due from the defendant to one Krishna Mudali. He also paid Rs. 655 on the 29th January 1915 and a sum of Rs. 515-9-0 on the 3rd April 1915 directly to the defendant. The plaintiff's case is that, notwithstanding the receipt of these monies, the defendant refused to execute the Swamibogam deed, and that therefore he should be compelled to execute the document. The 1st defendant denied the payments above referred to and contended that the document on which the claim for specific performance was based was not receivable in evidence as it was not registered. The Subordinate Judge in a careful judgment found all the points in favour of the plaintiff, and passed a decree directing the execution of the deed on payment of Rs. 759-15-8. The 1st defendant has appealed.

9. Before dealing with the main contentions in the case, I shall dispose of the minor points argued by Mr. Balasubramania Aiyar. It was suggested that the two sums of Rs. 515-9-0 and Rs. 655 were not independent payments,

but were paid as rent due to the defendant in respect of the previous occupation of the properties by the plaintiff. In the day-book of the plaintiff, Exhibits J1 and J2, these two payments are entered as advances to the defendant. There is no reason to doubt the accuracy or genuineness of these two documents. There is reliable evidence that the defendant was in need of money at this time and that he received the monies not as being entitled to them as landlord, but only as borrower. I see no reason to differ from the Subordinate Judge in his appreciation of the evidence on these points.

10. As regards the sum of Rs. 2,000, the Subordinate Judge has dealt with it at some length in paragraph 9 of his judgment. Shortly put, the position of affairs was this. The defendant was indebted to Krishna Mudali in a sum of Rs. 2,000. Plaintiff was asked to discharge that debt. Two months after the date of the agreement in question, the plaintiff executed a promissory note for that amount to Krishna Mudali. Krishna Mudali thereupon endorsed payment on the original promissory note given by the defendant to him. It is thus clear that Krishna Mudali absolved defendant from liability and looked to plaintiff for payment. When the parties fell out, the 1st defendant who is a relation of Krishna Mudali induced another relation of his, the 2nd defendant, to execute a fresh promissory note to Krishna Mudali ignoring the endorsement upon the note which he executed and also the promissory note executed by the plaintiff. It is slid that a suit has been brought by Krishna Mudali for the sum due. I feel no hesitation in agreeing with the Subordinate Judge that Krishna Mudali and the 1st and 2nd defendants have colluded together and are acting in concert to make the Court believe that the liability of the 1st defendant to Krishna Mudali has not yet been discharged. I accept the conclusion of the Subordinate Judge that, the sum of Rs. 2,000 must be deemed to be a payment by the plaintiff to the defendant. The defendant notwithstanding these payments has not delivered possession of the properties to the plaintiff. The Subordinate Judge was therefore right in calculating interest on the payments and in holding that the plaintiff had paid on the date of the suit a sum of over Es. 4,000 to the 1st defendant.

11. One other small matter may be disposed of before proceeding further. In the agreement there is a stipulation that if the defendant did not

execute the document in time, the plaintiff would, be entitled to add a sum of Rs. 750 to the Rs. 4,750 remaining due and to get a document

executed as if he had paid Rs. 5,500. This is purely a penal provision and I do not think that Courts will be justified in directing specific

performance of an agreement with these penal terms. The Courts have a discretion to vary the terms of a contract and to delete so much of it as in

their opinion is not equitable.

12. Now I proceed to consider the main questions argued by Mr. Krishnaswami Aiyar for the appellants. The first contention was that the

document in question is an agreement to lease and as it is not registered it should not have been received in evidence in support of a claim for

specific performance. It is settled law See *Narayanan Chetty v. Muthiah Servai* ILR (1910) Mad. 63 that a document requiring registration cannot

be the basis of a suit for specific performance. The question is whether Exhibit A is an agreement to lease or an agreement to mortgage. If it is the

latter, it does not require registration. If it is the former, it must be registered. An intermediate position is that the document may be construed as a

combination of an agreement to lease and also to mortgage. In that case, the further question would be whether it should be registered.

13. On the construction of the document, various authorities were quoted by the learned Vakil. Before dealing with them, I shall examine the

provisions of the document. It says that (a) the defendant has agreed to give the plaintiffs in Swamibogam the nanja and punja properties for 20

years from the 1st May 1915; (b) the consideration is stated to be Rupees 5,000 of which Rupees 250 was acknowledged to have been received

on the date of the agreement; (c) the balance of Rupees 4,750 was agreed to be paid within the 15th April 1915 when the deed itself was to be

executed by the defendant ; (d) the said Rupees 5,000 and the interest thereon were to be realized by the enjoyment of the properties for 20

years. There are provisions for payment of kist which I need not refer to now; (e) the plaintiff agreed to pay the defendant 100 kalams of samba

paddy, Rupees 300 in cash, 300 bundles of straw and also to procure 50 labourers for each year; (f) it is stipulated that the land should be

delivered after a period of 20 years ; (g) there is a penal provision for adding Rupees 750 more in case the defendant did not execute the deed on

the 15th of April 1915 ; and lastly (h) the document provides for enjoyment of the properties for 8 years certain, and for redemption by the

defendant notwithstanding the fixed period of 20 years at any time after the 8th year on payment of the Rupees 5,000. In my opinion the document

is a usufructuary mortgage, and falls strictly within the definition of the term contained in Section 58, clause (d) of the Transfer of Property Act. Mr.

Krishnaswami Aiyar contended that the provision for the delivery of paddy, money and straw to the defendant took the document out of the

category of usufructuary mortgages. I am inclined to think that the clause "" partly in lieu of interest and partly in payment of mortgage money "" in

Section 58(d) does not prevent the payment of a portion of the usufruct to the mortgagor. In my experience of the Southern Presidency, it is almost

an ordinary term of a usufructuary mortgage to provide for the payment either of a consolidated sum or of an annual sum to the mortgagor; and I

am not satisfied that such a provision is obnoxious to Section 58 Clause (d) of the Transfer of Property Act. The clue to the interpretation of the

definition may be gathered from Sections 76 and 77 of the Transfer of Property Act. Clause (g) of Section 76 provides for the mortgagee keeping

clear and accurate accounts of all sums received and spent by him and also directs the mortgagee to give the mortgagor true copies of such

accounts and of the vouchers by which they are supported ; clause (h) provides for the surplus of the usufruct being paid to the mortgagor under

certain circumstances. 3. 77 provides that nothing in Clauses b, d, g and h [(b) being a provision for the collection of rents and profits and (d) being

a provision for repairs] applies to cases where there is a contract between the mortgagor and the mortgagee that the receipts from the mortgaged

property shall be taken in lieu of interest on the principal money or in lieu of such interest and defined portions of the principal as may be agreed

upon. As I understand this section, it means that ordinarily, having regard to the fact that the relationship is that of debtor and creditor, it is the duty

of the mortgagee to keep proper accounts. But this duty may be dispensed with where there is a contract between the parties that the usufruct,

whatever it may amount to, shall be applied in a definite way towards the liquidation of the debt or of the interest on the debt, In other words

Section 77 contemplates a contract between the mortgagor and the mortgagee that the income of the property shall be appropriated in a particular

manner. I fail to see why a contract that a definite portion of the income shall be paid annually to the mortgagor should not find a place in a deed of mortgage or in an agreement to give such a deed. Therefore without reference to the authorities, I am of opinion that the document in question is an agreement to give a usufructuary mortgage. No doubt the terms of Section 105 of the Transfer of Property Act are to a large extent complied with by this agreement. The Rupees 5,000 may be regarded as premium, and the annual payment may be regarded as rent. The insertion of a clause as to enjoyment during a specified period is also within that section : but in a lease simpliciter, there will be no provision for interest upon the amount ; and there will not be a provision for redemption as in the present document. I am therefore unable to hold that this is an agreement to lease.

14. There is no doubt a possibility of construing it as a combination of an agreement to mortgage and to lease. The elements which make up a mortgage are to be found in the provision relating to principal and interest and to the redemption of the property after a fixed period. It is also clear that the property is regarded as security for the monies to be advanced. The supplementary provision regarding the annual payment is in the nature of a lease. Therefore there is great force in the contention of the learned Vakil that" the document in question partakes of the character of a lease and of a mortgage. Even in that view, as I shall show presently, the document would not require registration ; but my inclination is to regard the document as purely a usufructuary mortgage, because a mortgage of that kind has many elements in common with a lease.

15. Now I shall deal with the cases quoted at the bar. The citations from Dr. Ghose's book on mortgage, Vol. 1, pages 95 and 96 only point to the difficulties attendant upon the construction of such documents. The learned author after referring to the conflict of judicial opinion, inclines in favour of holding similar documents to be agreements to mortgage and not to give a lease. With one observation of his, I am in entire agreement, namely, that the construction must be based upon the intention of the parties and not upon an academical discussion regarding the inapt words used in the instrument. In Reference, under the Stamp Act, Section 46 ILR (1883) M. 203 the question for consideration before the Full Bench was as to the stamp to be affixed on the document. There were three instruments before them, but we are concerned only with the third of them. The

learned Chief Justice who delivered the judgment of the Court says that
"although the parties may have understood and described the transaction

as a mortgage, it was in fact a sale for a term or a lease for 9 years with a reserved rent of Rs. 35, in consideration of Rs. 899-12-0, the amount of

the debt and interest." It is not shown that there was any provision for redemption in that case. This opinion of the Chief Justice may, no doubt, be

taken as suggesting that although interest may be payable upon the advance, the document may still be regarded as a lease. I do not think that this

case covers the present. In *Kammara Peda Subbayya v. Kararhe Chennappa* (1914) 28 M.L.J. 303, the question related to limitation. There the

document was completed. It was not an agreement that the learned Judges had to consider. Exhibit B which is given in full in the judgment contains

no stipulation for redemption as in the present case. Therefore that is not an authority which is conclusive on the point. On the other hand, the cases

quoted by Mr. Muthukrishna Aiyar on behalf of the respondent show that documents like the present one should be construed as mortgages.

Mashook Ameen Suzzada v. Marem Reddy, Venkata Reddy and two Ors. (1878) 8 M.H.C.R. 31, is a case in point. In Reference under Stamp

Act, ILR (1898) Mad. 358 four Judges of this Court held that a provision for enjoyment of the property for a particular period coupled with a loan

rendered the document a usufructuary mortgage. No doubt the opinion was given with reference to the amount of stamp duty payable. It is also

true that there was no provision for the payment of rent as such. I do not think that in the present case it can be said that there is a provision for

payment of rent as such. Reference may also be made to *Mahamad v. Bagas* I.L.R (1908) Bom. 569. I do not propose to consider the other

cases quoted before us, as in my opinion the document in suit is strictly within the definition of the term usufructuary mortgage ; and the provision

for redemption would be inconsistent with the parties having intended to treat it as an agreement to lease.

16. The intermediate view which I referred to namely, of regarding the document as a combination of mortgage and lease, derives its support from

the decision of the Judicial Committee in *Bengal Indigo Company v. Raghobur Das* ILR (1896) Cal. 272. The other decisions Reference u/s 46,

Stamp Act, ILR (1881) Cal. 254 *N.V. Silapani v. V.M. Ashta Murthi* ILR (1880) Mad. 382 *Perlathail Subba Rao v. Mankude Narayan* ILR

(1881) Mad. 113 and Gopalan Nair v. Kunhan Menon ILR (1907) Mad. 300 also regard documents more or less of a similar character as not

wholly within the category of usufructuary mortgages. Granting that the document in question is not an agreement to mortgage, I am unable to agree with the contention that it should be registered under the Registration Act.

17. u/s 17 of the Registration Act, written instruments referred to in Clause (1) sub-Clause (a), (b) and (c) which would include sales, gifts and

mortgages, should be registered, if the value exceeds rupees 100. Sub-clause 5 of Clause (2) in terms excludes from this liability documents which

by themselves, do not create, declare, assign etc., rights in Immovable property. That clause makes it clear that an agreement to sell or to mortgage

need not be registered, because Clause (2) begins by saying that "" nothing in Clauses (b) and (c) of Sub-section (1) applies to the following

instruments."" It is noticeable that sub-clause (d) of clause I is not referred to in Clause 2. Clause I (d) says that"" leases of Immovable property from

year to year or, for any term exceeding one year, or reserving a yearly rent should be registered"". As I said before an agreement to give a lease is

not among the exempted documents in the second clause. Further the definition of the term lease in Section 2 includes an agreement to lease as

well; whereas, under the definition of the terms "" mortgage "" or ""sale "" as contained in the Transfer of Property Act, an agreement to mortgage or

an agreement to sell would not be included. It is rather an anomalous position that an agreement to lease should be compulsorily registrable

whereas an agreement to give a mortgage or to sell should be exempted from such a provision. However the legislature has chosen to impose such

a liability upon agreements to lease alone, and we are bound to give effect to that intention. At the same time, it is clear that unless a document

comes strictly within the four corners of the expression ""lease"" we would not be justified in holding that the document should be registered.

18. The learned Vakil for the respondent drew our attention to some decisions which have held that provisions relating to registration should be

very strictly construed. Amjed Ali v. Ala Buksh (1868) 9 W.R.537, and Jiwan Ali Beg v. Basa Mal, ILR (1886) All.108 , have laid down this

principle. I am in entire agreement with these decisions. In my opinion, any provision which has the effect of preventing parties from adducing in

evidence a specified document for want of a technicality should be very strictly construed, and therefore unless a document is a lease pure and simple, I see no reason for applying Section 17, Clause 1(d) of the Registration Act to such instruments. If the term regarding the lease is only incidental to the main provisions of the document, I am prepared to hold that such a document need not be registered. I am also impressed by the argument for the respondent that, at best, the document in question is an anomalous mortgage as was held in *Raman Nair v. Vasudevan* Namboodripad ILR (1903) Mad. 26 and *Kaderkutti v. Imbichi* (1914) M.W.N. 618. If it is a mortgage of that description, my view is that it does not require to be registered, because it would come under Clauses 1(b) and (c) and Clause 2 (5) of Section 17 of the Registration Act. In this view, it is unnecessary to consider the further point argued by Mr. Krishnaswami Aiyar that if there was a combination of a mortgage and lease, the unregistered document cannot be looked at even for the purpose of enforcing the term relating to the mortgage.

19. The next important point is whether even if it is an agreement to give a usufructuary mortgage, a suit for specific performance is competent. The learned Vakil for the appellants with his usual ability contended that, if the amount agreed upon was not fully paid, by asking for specific performance, the plaintiff would be compelling the defendant to accept the loan with reference to the balance remaining unpaid. In *South African Territories v. Wallington* (1898) A.C. 309 it is definitely laid down that a contract to lend cannot be specifically enforced, affirming the decision of the Court of Appeal in *South African Territories v. Wellington* (1897) 1 Q.B. 692. That principle has been followed in this country in *Shaiiek Galim v. Sadarjan Bibi* ILR (1915) Cal. 59. *Ramakrishna v. Narayana* ILR (1914) Mad 80 also belongs to the same class. Mr. Krishnaswami Aiyar contended that an agreement to borrow stands on the same footing as an agreement to lend. It is not necessary for me to disagree with that contention although I am not prepared to hold that the principle of mutuality as laid down in *Flight v. Holland* (1828) 4, Russ, 298 : 88 E.R. 817 is of universal application. Without quoting many cases, I may refer to *James Jones and Sons Limited v. Tankerville (Earl)* (1909) 2 Ch. 440 where the principle of mutuality has been departed from to some extent. The decision in *Mir Sarwarjan v, Fakhruddin Mahomed Chowdhuri* ILR

(1911) Cal. 232, does not say that such a principle is of universal application. If in this suit, the only prayer was that the defendant should be compelled to accept the balance of the loan, I would have agreed that the suit should be dismissed. The principle of the English decisions followed in this country is that no person should compel another to accept a loan as he could very well advance it to another, and it would be unjust to compel the would-be borrower to accept it as he could in open market procure the loan easily. But in the present case, the object of the suit is not to compel the defendant to accept the loan. The aim is to obtain the security for the money already advanced and that security having been promised by the document the defendant is bound to fulfill it. There is a decision of the Allahabad High Court in *Mayaram etc. v. Prag Dat, etc.*, ILR (1882) All. 44 in which Mahmood, J., expresses a doubt whether, even when the whole of the money agreed upon has been paid, the plaintiff will be entitled to sue for specific performance. The learned Judge is apparently of opinion that money compensation would meet the ends of justice in such cases. I am afraid that the learned Judge has not adverted to the fact that the securing of a security by a lender is far more important to him than the obtaining of a decree for money against the borrower. This view of Mahmood, J., is opposed to two decisions of very eminent Judges in England in *Ashton v. Corigan* (1871) L.R. 13 Eq. Cas. 76 and *Hermann v. Hodges* (1873) L.R. 16 Eq. Cas. 18. In 21 Hasbury, p. 75 the law is thus summarised. "" In equity, a mortgage is created by a contract to execute, when required, a legal mortgage, or by a contract that certain property shall stand as security for a certain sum."" In *Fry on Specific Performance*, the same principle is enunciated. In Section 54 the law is thus stated, "" The Court will specifically enforce a contract to execute a mortgage, and that even with an immediate power of sale where the money has been actually advanced either before or at the time of the contract."" I fail to see why these principles should not be followed in this country. Therefore I am of opinion that the suit as brought was rightly instituted.

20. As regards the proper remedy to be given, there is room for considerable divergence of opinion. The Subordinate Judge has decreed specific performance of the entire contract on payment of the balance due. It was argued by Mr. Krishnaswami Aiyar that this provision in the decree

indirectly compels the defendant to accept the balance of the loan. "" Speaking for myself, I do not think that this objection is well founded. What

the House of Lords has laid down in the case already referred to is that a party plaintiff is not entitled to claim specific performance of a contract to

lend or to borrow. If he comes into Court with such a specific prayer and if there is nothing more in the plaint, the suit will be rightly dismissed. But

where the prayer is strictly within the rights of the plaintiff, it is competent to the Court to annex conditions in the decree calculated to render justice

between the parties. The domain of the rights of the parties is then passed and that of the function of the Court comes into play. The Court in the

plenary powers it possesses of exercising discretion or of imposing suitable conditions in the interests of justice, being seized of the subject matter

of the suit, can proceed to annex or disannex conditions suo moto, in order that complete justice may be rendered. I do not think that the principle

that there cannot be a suit for specific performance either to borrow or to lend has any application to the exercise of the Courts" powers as above

indicated. In my opinion therefore the view taken by the Subordinate Judge that specific performance should be decreed on payment of the

balance was well within his jurisdiction. There is authority for enforcing the contract in its entirety even though the full amount has not been paid.

Mr. Muthukrishna Aiyar quoted *Bass v. Clively* (1829) 48 Eng. Rule 33 : *Tamlyn* 80 wherein Sir John Leach, the Master of the Rolls, decreed

specific performance of a contract to mortgage even though the full amount had not been paid, This case is no doubt open to the construction put

upon it by Mr. Krishnaswami Aiyar that the decree was by consent. But if the decree could not be passed, the Master of the Rolls would not have

acted on the consent, therefore the procedure adopted must be taken to have been legal. I fail to see why Courts should not do what the parties

can agree to and impose a condition for the payment of the balance before specific performance is decreed, There is also a citation in 21 Halsbury

at p. 75 under note (b) of an Irish case of *Hunter v. Langford* (1829) 2 Mol. 272, in which specific performance was ordered of an agreement to

grant or mortgage for a loan of ₹ 30,000 of which ₹ 1,000 alone had been already advanced. In my opinion, therefore, the decree of the

Subordinate Judge is not wrong.

21. My learned brother thinks that this is a case in which our discretion should be exercised by decreeing damages, rather than decreeing specific

performance. I agree with the order proposed by my learned brother as to costs, damages and indemnity.