

CIVIL REVISION.

Before Derbyshire C. J. and Mukherjea J.

MAHENDRA NATH SARDAR

v.

KALI PADA HALDAR.*

1940

June 25, 26.

Mortgage—Occupancy holding—Restoration of mortgaged property to mortgagor—Construction of mortgage-bond—Usufructuary mortgage—Mortgage by conditional sale—Bengal Tenancy Act (VIII of 1885), s. 26G, as amended by Bengal Tenancy (Amendment) Act (Ben. VI of 1938).

By a mortgage bond, dated April 4, 1923, in respect of certain occupancy holdings, it was provided that the mortgagee would enjoy the usufruct of the holdings and credit the same towards interest falling due under the mortgage bond. Possession of the mortgaged property was accordingly delivered to the mortgagee. In the bond the transaction was described as a mortgage by conditional sale, and there were in it provisions as to the release of the mortgaged property upon payment of the mortgage-debt on the due date, *viz.*, April 13, 1932, and also as to the conditional sale becoming absolute in default of payment of the mortgage-debt on the due date.

Upon an application by the mortgagor under s. 26G (5) of the Bengal Tenancy Act, 1885, for restoration of the mortgaged property to him, on the ground that the transaction was a usufructuary mortgage and the consideration for it had been extinguished on the expiry of a period of fifteen years from the date of registration of the mortgage bond :

Held that the mortgaged property could not be restored to the mortgagor under s. 26 G (5) of the Act, inasmuch as the transaction was substantially a mortgage by conditional sale, and not a usufructuary mortgage, as the essential characteristic of a usufructuary mortgage, *viz.*, that the mortgagee is to retain possession of the mortgaged property until the mortgage-debt is paid, was absent.

CIVIL RULE obtained by the mortgagees of certain occupancy holdings.

The facts of the case and the argument in the Rule appear sufficiently from the judgment of Mukherjea J.

Prafulla Kumar Das for the petitioners.

Abinas Chandra Ghose for the opposite parties.

*Civil Revision No. 538 of 1940, against the order of Narayan Chandra Basu, Subordinate Judge, Third Court, Alipore, dated March 26, 1940.

1940
—
*Mahendra
Nath Sardar
v.
Kali Pada
Haldar.*

MUKHERJEA J. This Rule is directed against an order of the Subordinate Judge, Third Court, Alipore, dated March 26, 1940, made in a proceeding under s. 26G (5) of the Bengal Tenancy Act, 1885, as amended by the Bengal Tenancy (Amendment) Act, 1938.

The petitioners are the mortgagees under a mortgage deed, which was executed on April 4, 1923, by opposite party No. 3 on behalf of herself and her two sons, the opposite parties Nos. 1 and 2, who were then minors.

The case of the opposite parties was that it was a usufructuary mortgage and, they presented the application for restoration of the mortgaged properties under s. 26G (5) of the Bengal Tenancy Act, on the ground that more than fifteen years having elapsed from the date of registration of the instrument the consideration of the mortgage was extinguished.

The mortgagees resisted the claim substantially on two grounds: It was urged, in the first place, that the mortgage was one by conditional sale and not a usufructuary mortgage and as such the provisions of s. 26G (5) of the Bengal Tenancy Act were not applicable. The second point taken was that the mortgagors having represented to the mortgagees that the properties mortgaged were *mokarâri* holdings held by them at a fixed rent, they were estopped from saying that these were occupancy holdings which would attract the operation of s. 26G of the Bengal Tenancy Act.

Both the defences were negatived by the learned Subordinate Judge, who allowed the application of the opposite parties for restoration of possession of the mortgaged properties. It is against this order that the present Rule has been obtained. The

learned advocate, who appears for the petitioners, has challenged the propriety of the decision of the trial Court on both these points.

As regards the first point, it is conceded on both sides that the mortgage in dispute could not rank as a complete usufructuary mortgage as defined in s. 3 (3) of the Bengal Tenancy Act. The only question is whether it is a usufructuary mortgage at all and the document, being executed prior to the commencement of the Bengal Tenancy (Amendment) Act of 1928, could take effect as a complete usufructuary mortgage under the provisions of sub-s. (1a) of s. 26G.

In the document itself the parties described the transaction as a mortgage by conditional sale, and the expression *kāt kabālā* is used throughout the instrument. The mortgagors purported to execute the mortgage by conditional sale in respect of their share of the mortgaged properties to secure an advance of Rs. 1,400 only. The possession of these properties was delivered over to the mortgagees and the stipulation was that they would enjoy the usufruct of the land and credit the same towards the interest due on the mortgage bond. The document mentions a due date which was the end of Chaitra, 1338 B. S. (April 13, 1932), and the mortgagors promised to pay the entire mortgage-debt within that time upon which the mortgaged properties would be released to them. Then there appears a clause which runs as follows:—

If we make default in paying you the principal sum on or before the due date aforesaid, viz., within the month of Chaitra, 1338 B.S., then on expiry of the said due date you will be entitled to foreclose the mortgage and this conditional sale will thereupon ripen into an absolute sale, and, in that event, you, your sons, grandsons, other heirs, and your assigns will have title to the properties and will possess the same in great felicity and in any way you like.

Taking this document as a whole, I am unable to say that this is a usufructuary mortgage as contemplated by s. 58 (d) of the Transfer of Property Act,

1940

—
Mahendra
Nath Sardar

v.
Kali Pada
Haldar.

—
Mukherjea J.

1940

Mahendra
Nath Sardar

v.

Kali Pada
Haldar.

Mukherjee J.

1882. It is true that the mortgagees were given possession of the mortgaged properties and they were entitled to appropriate the rents and profits towards the interest due. But the essential element of a usufructuary mortgage was wanting, namely, that the mortgagee would retain possession of the properties till the mortgage money was paid. The mere mentioning of a due date for payment is indeed not material and could be considered as a mere proviso for redemption if the provision was that in default of redemption the mortgagees would continue to hold the property and go on enjoying the same till the mortgage money was paid.

In the document in dispute not only there is no such term, but on the other hand the express provision is that in default of payment of the mortgage money within the due date, the mortgagee will be entitled to foreclose; the *kât kabâlâ* would then ripen into a *sâf kabâlâ* or an out and out sale.

In my opinion, the transaction was substantially what it purported to be, namely, a mortgage by conditional sale though certain rights of an usufructuary mortgage were also given to the mortgagees. I am not impressed by the argument of Mr. Ghose that the document could not be construed as a mortgage by conditional sale, because there are no express words of transfer in the document showing that the mortgagor ostensibly sold the property to the mortgagees. The expressions *kât kabâlâ* and *sâf kabâlâ*, which are used in the document, are, in my opinion, quite sufficient for this purpose. It is a mortgage by conditional sale of the type mentioned in the first para. of s. 58 (c) of the Transfer of Property Act, where, in default of payment of the mortgage-money within a certain date, the sale becomes absolute.

So far as the second point is concerned, we are not inclined to disturb the finding of the Subordinate

Judge on this point and hold that there was no estoppel to preclude the mortgagor from showing that the holdings were really occupancy holdings.

The Rule, however, must succeed on the first ground. The result is that the Rule is made absolute, the order of the Subordinate Judge is set aside and the application for restoration of the mortgaged properties made by opposite parties Nos. 1 to 3 is dismissed.

We make no order as to costs in this Rule.

DERBYSHIRE C. J. I agree.

Rule absolute.

P. K. D.

1940

*Mahendra
Nath Sardar*

v.

*Kali Pada
Haldar.*

Mukherjea J.