separated from them after the demise of those parents, &c.," while it affirms the conclusion already stated, that partition does not destroy the right of inheritance, is not to be understood as implying that there can be no succession to the father's share in the lifetime of the mother, but that, on the death of either parent, his or her property may be divided, but not, as the section goes on to declare, so as to annul any gift which the father may have made out of their separate shares. The gist of the section is to declare that valid gifts may be made to their children, by parents separated from their children, out of shares which on partition have fallen to or been allotted to them. The separated son then must be held entitled to succeed to the estate of his father in preference to the widow.

The appeal is decreed, and the decree of the Lower Appellate Court reversed with costs.

APPELLATE CIVIL.

Before Mr. Justice Innes and Mr. Justice Muttusámi Áyyar.

VENKATE'SHWARA (DEFENDANT), APPELLANT, *v.* KE'SAVA-SHETTI (PLAINTIFF), RESPONDENT.* 1879. July 23.

Mortgagee in possession under an agreement to pay rent to the mortgagor—Accidental destruction of the mortgagee's premises by fire—Right of the mortgagor to rent.

The plaintiff borrowed Rs. 1,400 from the defendant, and mortgaged to the latter for eight years a piece of ground with a warehouse standing thereon There was an agreement between the parties that the rent of the warehouse should be Rs. 16-12-0 per mensem, and that out of this amount the mortgagee should appropriate Rs. 14 towards the payment of the interest on the principal sum and pay Rs. 2-12-0 as rent to the mortgagor. Within four years from the date of the mortgage the warehouse was destroyed by fire, and thereupon the mortgagee ceased to pay rent to the mortgagor. The latter sued to recover the site together with arrears of rent. The District Judge was of opinion that the defendant should lose the interest on the loan up to the date of the term for the redemption of the mortgage, and that he was bound to pay to the plaintiff the rent claimed by him.

Held by INNES, J.—That the loss of the premises which had arisen from accidental causes could not affect defendant's right to recover the full amount due to him on the

* Second Appeal, 646 of 1878, against the decree of H. Wigram, Acting District Judge of South Malabar, dated 31st August 1878, reversing the decree of the Subordinate Court of Cochin, dated 30th March 1878.

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mortgage. There was no alteration in the liability, but merely in the source and mode of discharge. The premises having ceased to exist, nothing arising from the income could be credited towards the mortgage and there was no residue available to pay plaintiff.

Held by MUTTUSÁMI ÁYYAR, J.—That defendant's right of possession rested on the usufructuary mortgage and not on tenancy, and his right to recover his debt with interest thereon could not be extinguished or modified by the destruction of the warehouse. As to the surplus payment, the existence of the warehouse, which produced the income of Rs. 16¾ a month, was the basis of the contract to make it; and the basis having failed, the obligation resting thereon must likewise fail.

THIS was a second appeal against the decree of the District Judge of South Malabar in Appeal Suit No. 451 of 1878.

T. Ráma Rau for the Appellant.

Messrs. *Grant and Grant* for the Respondent.

The facts of the case are fully set forth in the Judgments of the Court (INNES, J., and MUTTUSA'MI ÁYYAR, J).

INNES, J.—Plaintiff on the 9th November 1872 mortgaged to defendant certain land with a warehouse standing on it. On the ground of defendant's failure to pay the rent he now sought to recover the land, including the site of the warehouse (which latter had been accidentally destroyed by fire on the 7th January 1876) together with rent from 1st July 1877.

A suit brought for the rent before the Sub-Judge, as Judge of the Small Cause Court, had been already dismissed by the Sub-Judge on the ground that, by the act of God, the fulfilling of the contract had become impossible.

The defendant contended that the warehouse and site were mortgaged to him for eight years, and that plaintiff could not recover until the expiry of the time; and that since the destruction of the premises he was not liable for rent. He claimed also to set off the interest on the mortgage.

The Sub-Judge dismissed plaintiff's suit.

The District Judge on appeal found that the arrangement had been that the rent of the destroyed premises should be Rs. 16¾ a month, out of which Rs. 14 monthly were to be carried to the credit of interest on the principal sum advanced, and Rs. 2¾ were to be paid as rent to the landlord, the mortgagor, and that plaintiff by the agreement was bound to repair. Upon this state of facts he considered that the English Common Law rule, which would require the tenant to rebuild the premises in the absence of an agreement on the part of the landlord to repair, did not

apply, and that in certain circumstances an injunction might be granted to prevent the landlord (who had undertaken to repair) from suing to recover the rent until he had rebuilt the premises; but that, as matters stood, it was equitable that the loss arising from the accident of the fire should be apportioned equally. He thought that defendant should lose the interest on the advance up to the date of the term for the redemption of the mortgage at the rate of Rs. 14 a month, which he was to have received from the rents, and that he was still bound to continue to pay the balance of Rs. $2\frac{3}{4}$ to the plaintiff, who, on the other hand, would lose the value of the destroyed premises.

He considered the construction placed upon Section 56 of the Contract Act by the Sub-Judge to be erroneous. He allowed Rs. $38\frac{1}{2}$ rent for fourteen months at Rs. $2\frac{3}{4}$ a month, but disallowed plaintiff's claim to recover the premises as he was not entitled to do so within the time fixed by the mortgage.

The second appeal is made on the grounds—

(1) That the suit should have been a suit for redemption.

(2) That rent was not recoverable, as the warehouse was destroyed in a general conflagration and plaintiff has not rebuilt the premises.

(3) That defendant should not, under the circumstances, lose the interest on the amount advanced on the mortgage.

(4) That the agreement to pay rent has become void under Section 56 of the Contract Act.

(5) That plaintiff's claim for recovery of the rent is barred by Section 13, Act X of 1877.

(6) That the decision of the Lower Appellate Court is not in conformity with the relief sought for by the plaintiff in his plaint.

We agree with the District Judge upon the question of the applicability of Section 56 of the Contract Act to this case. That section clearly does not apply to a case in which, although the consideration of the contract is lost, the performance of the promise on the other side is still possible. In the present case the defendant, though he can no longer enjoy the premises, can nevertheless pay Rs. $2\frac{3}{4}$ a month.

The contract for the payment of rent to plaintiff appears to be only incidental to the contract of mortgage. Defendant advanced

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a sum of Rs. 1,400, and plaintiff secured the repayment of that sum by placing certain premises in defendant's possession for eight years free of rent, except Rs. $2\frac{3}{4}$ a month, to be paid to plaintiff. At the close of the term, if the sum were not repaid, defendant might recover on the security of the premises.

There was a usufructuary mortgage, out of the rents and profits of which, equivalent to Rs. $16\frac{3}{4}$, defendant was to apply Rs. 14 in discharge of the mortgage, while Rs. $2\frac{3}{4}$ was to be received by the mortgagor through the defendant.

How, then, have the relative obligations of the parties been altered by the circumstance of the fire?

The gist of the arrangement was the liquidation of the mortgage at the rate of Rs. 14 a month through the rents and profits of the security, with payment of the monthly balance of the rents and profits to plaintiff. The result to the defendant through the fire is that he no longer receives the equivalent of Rs. $16\frac{3}{4}$ monthly, so that the basis for the credit of Rs. 14 a month to the amount due on foot of the mortgage and of payment of Rs. $2\frac{3}{4}$ a month to plaintiff no longer exists. In the loss of the premises also he loses the main portion of his security. But this loss, which has arisen from accidental causes, cannot affect defendant's right to recover the full amount due to him on the mortgage. He cannot on this account (as the District Judge seems to suppose) be deprived of the right to recover eventually the amount which it was contemplated by the parties would be discharged by the monthly payment from the rents. There is no alteration in the liability, but merely in the source and mode of discharge.

Another question is whether—an agreement to pay rent entering into part of the contract of mortgage—plaintiff is entitled to call upon defendant to pay the arrears of rent due, notwithstanding the destruction of the premises and before he is in a position to redeem.

If the agreement to let the premises be regarded as a contract apart from the mortgage, the undertaking to repair and the agreement to pay rent, would, under English law, be independent covenants, and the performance of either would not be a condition precedent to the performance of the other; and as the English rule is founded upon the reason, which equally existed here, that the

breach of such a covenant goes only to part of the consideration, probably the same rule should apply in this country; and in that case plaintiff would be entitled to recover the rent notwithstanding his failure to rebuild, and defendant would have his cross action for damages for plaintiff's failure to rebuild. But it is impossible to regard the agreement to let the premises as a contract apart from the mortgage.

The rent was a deduction from the profits of the usufruct, which was part of defendant's security for the amount advanced.

The parties evidently regarded the Rs. $2\frac{1}{4}$ as the residue of the estimated value of the income after crediting Rs. 14 towards discharge of the mortgage.

The gist of the agreement was not a letting of the premises with a rent reserved, but a usufructuary mortgage of the premises with a certain small portion of the income of it made payable to plaintiff. The agreement imported that the premises should be in existence, and be available for yielding an income out of which monthly sums should be relinquished to the mortgagee and the residue should be paid to plaintiff, and plaintiff expressly undertook to keep up the premises. The premises have ceased to exist through no default of defendant. Nothing therefore arising from the income can be credited to the mortgage, and there is no residue available to pay plaintiff. It seems obvious that plaintiff cannot recover the rent that has fallen due and is unpaid.

The application of the income of the premises is properly an item in the account between the mortgagor and mortgagee which cannot at present be taken.

It follows from this also that plaintiff's claim to recover the land in defendant's possession under the mortgage, on account of defendant's failure to pay the rent, is unsustainable.

The decree of the Lower Appellate Court must be reversed and the suit dismissed with costs.

MUTTUSAMI ÁYYAR, J.—I am also of the same opinion. I may, however, add in accordance with the finding of the Courts below, that the transaction between the parties is really a mortgage with possession for a term of eight years. The contract to pay Rs. $2\frac{1}{4}$ per mensem is rather a subsidiary arrangement regarding the disposal of the surplus usufruct, or, in other words, an agreement to treat as money had and received for the plaintiff's use the

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surplus which, as mortgagee, the defendant might otherwise credit to the principal amount of the mortgage, than an independent engagement to pay rent as in an ordinary lease. I take the defendant to have really got into possession not as a tenant—not because he engaged to pay the plaintiff Rs. 2¾ a month for the use of the warehouse—but as a mortgagee, and because of the assignment of the usufruct in lieu of interest amounting to Rs. 14 per mensem. The case before us is not the one in which the mortgagor retains actual possession of the property under mortgage by becoming the tenant of the mortgagee, but it is the converse, in which the mortgagee obtains possession in his own right to the usufruct, and specially undertakes to pay the plaintiff the excess usufruct instead of crediting it to the debt. Defendant's right of possession rests, therefore, on the usufructuary mortgage and not on tenancy; and his right to recover his debt, with interest thereon, cannot be extinguished or modified by the destruction of the warehouse, which formed the material portion of what was given as security by way of strengthening that right, unless such destruction is imputable to his fault or he is under an obligation, which by express contract he is not, to rebuild or restore the building. It is therefore unnecessary to express an opinion in this suit whether, as between landlord and tenant, rent ceases or continues to be payable after the destruction of the premises let, or whether we can take power to readjust the original contract on an equitable basis supposed to be better suited to the altered state of things. As to the surplus payment, the existence of the warehouse, which produced the income of Rs. 16¾ a month, is, according to the intention of the parties, the basis of the contract to make it, and the basis having failed, the obligation resting thereon must likewise fail.

I would also reverse the Judgment appealed against and dismiss the suit with costs.