

aside a summary order, in other words, that the result, not the formal wording of the suit, should be considered.

“If consequential relief be deemed as prayed for, the deficiency is Rs.  $70 \times 3 = 210$ .

“If a declaratory decree *plus* an order to set aside a summary order is deemed as prayed for, the deficiency is Rs.  $10 \times 3 = 30$ .

“As it is important to have a clear ruling, and I am inclined to think there is much to be said in favour of the latter view, I refer the question to the Court.”

The case came before Brodhurst, J., who referred it to a Division Bench.

Mr. *Hamidullah*, for the appellant.

STRAIGHT and TYRRELL, JJ.—A court-fee of Rs. 10 must be paid in respect of each of the reliefs prayed.

*Before Mr. Justice Brodhurst and Mr. Justice Mahmood.*

UMDA AND OTHERS (DEFENDANTS) v. UMRAO BEGAM (PLAINTIFF).\*

1888  
December 11.

*Mortgage, usufructuary—Suit for sale by usufructuary mortgagee—Suit not maintainable—Act IV of 1882 (Transfer of Property Act), s. 67 (a).*

Under s. 67 (a) of the Transfer of Property Act (IV of 1882), a usufructuary mortgagee whose possession has not been disturbed cannot maintain a suit either for foreclosure or for sale on non-payment of the mortgage-money. *Chowdhri Umrao Singh v. The Collector of Moradabad* (1), *Dulli v. Bahádur* (2), *Ganesh Kooer v. Deedar Buksh*, (3) *Venkatasami v. Subramanya* (4) and *Jhablu Ram v. Giridhari Singh* (5) referred to.

THE facts of this case were as follows :—

One Musammat Khanam Jan executed a usufructuary mortgage of a house in favour of one Inaitullah Khan for a sum of

\* Second Appeal No. 383 of 1887 from a decree of Maulvi Saiyid Muhammad Khan, Subordinate Judge of Moradabad, dated the 2nd December, 1886, confirming a decree of Maulvi Zakir Husain Khan, Munsif of Moradabad, dated the 30th August, 1886.

(1) S. D. A., N.-W. P., 1859, p. 13.

(3) N.-W. P. H. C. Rep., 1873, p. 128.

(2) N.-W. P. H. C. Rep., 1875, p. 55.

(4) I. L. R., 11 Mad., 88.

(5) I. L. R., 6 All., 289.

1888

UMDA

v.

UMRAO  
BEGAM.

Rs. 300 repayable after four years. The mortgage was executed on the 25th September, 1874, and under its terms the mortgagee was placed in possession. The mortgagee Inaitullah, on the 11th November, 1875, executed a deed of mortgage whereby he sub-mortgaged his mortgagee's rights in lieu of Rs. 300 for a term of two years ten months and twelve days, at the end of which the money borrowed was to be repayable. The second mortgage was executed in favour of Muzaffar Khan, who was no party to this litigation.

The aforesaid Muzaffar Khan by a sale-deed executed on the 19th December, 1878, conveyed his rights under the deed of the 11th November, 1875, to his wife, Musammat Umrao Begam, who was the plaintiff-respondent in the present case.

The original mortgagor, Musammat Khanam Jan, had a brother named Sadik Ali, and on her death the equity of redemption descended by inheritance upon the aforesaid Sadik Ali. After the demise of Musammat Khanam Jan, Sadik Ali executed a sale-deed of his equity of redemption in favour of the ladies, Musammats Umda and Intiazan. This was done on the 5th January, 1886.

The present suit was instituted by Musammat Umrao Begam with the object of recovering the mortgage-money by bringing the property to sale, and it was based upon the sub-mortgage of the 11th November, 1875, and also the terms of the original usufructuary mortgage of the 25th September, 1874. The defendants were Musammat Umda, and Musammat Akbari and Piare Khan the heirs and representatives of Musammat Intiazan.

The suit was defended upon various grounds, but those grounds were disallowed by both the Courts below, and those Courts decreed the claim for recovery of the money by bringing the property to sale in default of payment within one month.

The defendants appealed to the High Court. The questions raised by the grounds stated in the memorandum of appeal were (1), whether the usufructuary mortgage of the 25th September,

1874, could be so enforced as to bring the property to sale, and (2) if so, whether, with reference to the terms of the sub-mortgage of the 11th November, 1875, under which the plaintiff claimed as sub-mortgagee, she was entitled to maintain such a suit?

Munshi *Madho Prasad*, for the appellants.

Munshi *Kashi Prasad* and Mir *Zahur Husain*, for the respondent.

BRODHURST and MAHMOOD, JJ. (after stating the facts, as above, continued)—We have heard the learned pleaders for the parties upon both these points, but we are of opinion that the answer to the first point is sufficient for dismissal of the suit. Reading the terms of the original Hindustani of the mortgage-deed of the 25th September, 1874, which is the origin of the title asserted by the plaintiff, it seems to us perfectly clear that the deed is an ordinary deed of *rahn-bil-kubz*, that is to say, a deed of usufructuary mortgage involving possession of the mortgagee as the method and form of the security given to him for the loan advanced by him to the mortgagor. Further, it is admitted before us that under the terms of that document possession was actually given to the original mortgagee, Inaitullah Khan, under whom Musammat Umrao Begam claims to have the mortgagee's rights. There is no allegation that either the original mortgagee, Inaitullah Khan, or his sub-mortgagee, Muzaffar Khan, or the present plaintiff, Musammat Umrao Begam, have ever been unlawfully disturbed in their possession of the mortgaged house.

There is no contention of this kind, and what we have to consider is the question whether, under such circumstances, the plaintiff, even if she represented all the rights of the original mortgagee, Inaitullah Khan, could maintain such an action, which practically is a suit to secure a remedy such as that which appertains to an ordinary hypothecation, and is not contemplated by the relation created by usufructuary mortgage.

In considering this question we have been referred by Mr. *Madho Prasad* for the appellants to a ruling of the late Sadar Diwani

1888

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 UMRAO  
 v.  
 UMRAO  
 BEGAM.

1888

UMDA  
v.  
UMRAO  
BEGAM.

Adalat, N.-W. P., in *Chowdhri Umrao Singh v. The Collector of Moradabad* (1) and also to a ruling of a Division Bench of this Court in *Dulli v. Bahadur* (2). In the latter of these two cases it was held that "a suit on a deed of usufructuary mortgage to bring the property to sale for the realization of the amount due under the deed, where the property was not hypothecated in the deed to secure the debt, was unmaintainable."

The case was decided by Pearson and Spankie, JJ., and is mainly relied upon by Mr. *Madho Prasad* for the defendants-appellants. On the other hand, Mr. *Kashi Prasad* for the respondents relies upon another Division Bench ruling of this Court in *Ranee Ganesh Kooer v. Deedar Buksh* (3) and also on a ruling of the Madras High Court in *Venkatasami v. Subramanya* (4), and relying upon these judgments the learned pleader urges that even a usufructuary mortgagee in possession of the mortgaged property, without such possession being in any manner disturbed by the mortgagor, is entitled after the expiry of the period for which the money was borrowed, namely, the time of the mortgage, to recover such money by an action such as this, namely, an action which aims at recovery of money by bringing the mortgaged property to sale, much in the same manner as in the case of a hypothecation or simple mortgage as defined in clause (b), s. 58 of the Transfer of Property Act, IV of 1882.

In dealing with the contention urged before us, we do not think it is necessary for us to enter into any minute discussion as to the various reasons upon which the rulings which have been cited before us proceed. We are of opinion that whatever conflict of decision there may have existed, even if such conflict is understood to have existed, the law as embodied in s. 67 of the Transfer of Property Act represents the old law as it stood before the enactment came into force, and further that, even if the enactment itself is to be taken as representing that which the statute has enacted, the provisions of that statute are applicable to this case. Mr. *Kashi*

(1) S. D. A., N.-W. P., 1859, p. 131.

(3) N.-W. P. II. C. Rep., 1873, p. 128.

(2) N.-W. P. H. C. Rep., 1875, p. 55.

(4) I. L. R., 11 Mad., 88.

*Prasad* has indeed urged that the original mortgage in the case being dated the 25th September, 1874, and the sub-mortgage of the 11th November, 1875, being also anterior to the passing of the Transfer of Property Act, IV of 1882, that enactment has no bearing upon the fate of the decision of this case.

1888

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 UMDA  
 v.  
 UMIRAO  
 BEGAM.

It seems to us that the contention so addressed is analogous in principle to that which a Full Bench of this Court had to consider in *Ganga Sahu v. Kishen Sahu* (1), where the learned Judges went fully into the consideration of the various sections, of which the most important is the effect of the saving clause in s. 2 of the Transfer of Property Act. The effect of the decision was that the learned Judges held that where a mortgage is to be enforced, after the coming into force of the Transfer of Property Act, IV of 1882, whether such mortgage was anterior to such enactment or not, the date of deciding whether such enactment applies or not, is the date of the suit and not the date of the mortgage. This view was adopted by a Full Bench of the Calcutta High Court in *Bhobo Sundari Devi v. Rakhal Chander Bose* (2), and the broad effect of these rulings is that, although a mortgage may be anterior to the passing of the Transfer of Property Act, yet when a person comes into Court and claims remedy under a mortgage, the new procedure of the enactment would apply. We are, therefore, of opinion that s. 67 (a) of the Transfer of Property Act is applicable to the case, namely, that, even if the plaintiff is entitled to fall back upon the terms of the original mortgage of the 25th September, 1874, the mortgage being of a usufructuary character, she has no right to come into Court when her possession remained undisturbed, to claim either foreclosure or sale such as that she asks for in this action. In reference to this point we may refer also to the *ratio decidendi* of a ruling of this Court in *Jhabbu Ram v. Girdhari Singh* (3), to which case one of us was a party, and where the question was considered as to the circumstances under which a usufructuary mortgagee could sue for recovery of the mortgage-money. The case is not on all fours with the present case, and need not be considered further than by saying

(1) I. L. R., 6, All., 262. (2) I. L. R., 12, Calc., 533.

(3) I. L. R., 6, All., 239.

1888

UMDA  
v.  
UMRAO  
BEGAM.

that it fully recognises the law to be that the usufructuary mortgagee cannot, whilst his possession remains undisturbed, convert such usufructuary mortgage into hypothecation, or seek foreclosure or sale by an action such as this.

We are, therefore, of opinion that the suit and the relief prayed for in it were unmaintainable, and that the Courts below should have dismissed the suit altogether.

This view renders it unnecessary for us to consider the second point which has been pressed before us by Mr. *Mulho Prasad*, namely, whether or not a sub-mortgagee, such as the present plaintiff may possibly be under the terms of the deed of the 11th November, 1875, could, in any case, be entitled to maintain such an action. We are anxious to say that we express no opinion upon the matter, and because, taking the case on behalf of the respondent, she has no right for maintaining an action for bringing the property to sale.

For these reasons we decree the appeal, and setting aside the decrees of both the Courts below, dismiss the suit *in toto* with costs in all the Courts.

*Appeal allowed.*

*Before Mr. Justice Straight.*

1888  
January 23.

GIRDHARI AND OTHERS (DECREE-HOLDERS) v. SITAL PRASAD (JUDGMENT-DEBTOR).\*

*Limitation—Execution of decree—Sale in execution set aside—Application by purchaser for refund of purchase-money—Accrual of right to apply—Civil Procedure Code, s. 315—Act XV of 1877 (Limitation Act), sch. ii, No. 178.*

A suit by a judgment-debtor whose *sir* land had been sold in execution of a decree, to have the sale declared void and illegal, on the ground that the *sir* was incapable of sale, was decreed on appeal by the High Court on the 13th June, 1884. On the 11th June, 1887, the purchaser at the sale applied, under s. 315 of the Civil Procedure Code, for a refund of the purchase-money.

*Held* that the limitation applicable was that provided by art. 178 of sch. ii of the Limitation Act (XV of 1877); that the right to apply accrued on the passing of

\* Second Appeal No. 357 of 1888 from a decree of Manvi Shah Ahmad-ullah, Subordinate Judge of Muzpuri, dated the 22nd December, 1887, confirming a decree of Munshi Girraj Kisher Datt, Munsif of Etah, dated the 5th November, 1887.