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August 3.

Before Mr. Justice Knox and Mr. Justice Banerji.

JAFAR HUSEN (DEFENDANT) *v.* RANJIT SINGH (PLAINTIFF),*

Mortgage—Construction of document—Mortgage of a mixed character partly simple and partly usufructuary—Decree for sale—Act No. IV of 1882 *(Transfer of Property Act) section* 58.

In construing a mortgage deed, the terms of which are of a doubtful character, the intention of the parties, as deducible from their conduct at the time of execution and other contemporaneous documents executed between them, is to be looked to.

Mortgage-deeds of a mixed character and other than those expressly defined in section 58 of the Transfer of Property Act, 1882, must be construed as far as possible in accordance with the covenants contained in them. Where a deed is partly of the nature of a usufructuary mortgage and partly of the nature of a simple mortgage the mortgagee is entitled to bring the mortgaged property to sale under the conditions set out in the deed. *Shunker Lall* v. *Poorrun Mull* (1), *Phul Kuar* v. *Murlidhar* (2), *Jugal Kishore* v. *Ram Sahai* (3), *Umrao Begam* v. *Vali-ullah* (4), *Ramayya* v. *Guruva* (5) and *Sivakami Ammal* v. *Gopala Savundram Ayyan* (6) referred to.

THE facts of this case sufficiently appear from the judgment of KNOX, J.

Mr. *Karamat Husen* and Pandit *Moti Lal* for the appellant.

Messrs. *D. N. Banerji* and *B. E. O'Conor* and Babu *Satish Chandar Banerji* for the respondent.

KNOX, J.—Syed Jafar Husen executed a deed on the 12th of January 1888, whereby he transferred his interests in certain immovable property for the term of seven years to one Chaudhri Ranjit Singh for the purpose of securing the payment of one lakh of rupees advanced by Chaudhri Ranjit Singh to him.

The main dispute in this appeal turns upon the precise nature of the transaction between the parties.

The first plea in appeal is to the effect that the learned Subordinate Judge has misinterpreted the mortgage-deed in suit. The appellant contends that the transaction is a pure usufructuary mortgage.

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*First Appeal No. 227 of 1896 from a decree of Pandit Rajnath Sahib, Subordinate Judge of Moradabad, dated the 8th June 1896.

(1) N.-W. P. H. C. Rep., 1867, p. 150.
(2) I. L. R., 2 All, 527.
(3) Weekly Notes, 1886, p. 212.
(4) Weekly Notes, 1888, p. 171.
(5) I. L. R., 14 Mad., 232.
(6) I. L. R., 17 Mad., 131.

On the same day on which Syed Jafar Husen executed the mortgage-deed, three other documents were executed between the same parties. All the four deeds were registered on one and the same day, namely, the 21st January 1888. It will be necessary to examine carefully the wording of the mortgage-deed, and if its terms are not sufficiently clear and admit of more than one interpretation, it will be necessary further to ascertain in what manner the terms of the deed were understood and acted upon by the parties subsequent to their entering upon the contract, for, as was pointed out in *Shunker Lall* v. *Poorrun Mull* (1), the real intention of the parties to a deed may fairly be gathered from their conduct and from the effect given to the deed before the commencement of the dispute out of which the suit has arisen. It is hardly necessary to remind ourselves that where the terms of an instrument are doubtful, what we have to look at is the substance and not the mere form. The mortgage-deed will be found sufficiently well translated for the purposes of this appeal at page 1 of the respondent's printed book. After reciting that the shares in certain villages had been mortgaged by Syed Jafar Husen to Chaudhri Ranjit Singh, and that the mortgage money had been left with the mortgagee for the payment of debts due to certain creditors of the mortgagor, it states:—(1) that the mortgagor has put the mortgagee in possession of all the aforesaid villages; (2) that he authorises the mortgagee to appropriate the profits of the mortgaged shares in the villages in lieu of interest of the mortgage money during the term of the mortgage; (3) that he is entitled to redeem the mortgage after the expiration of seven years; (4) that the mortgagee is entitled to demand repayment of the mortgage money after the expiration of the term; (5) that if any difficulties or obstructions are placed in the way of the mortgagee, or any disputes or prior liens are found to exist, the mortgagee is at liberty to recover the mortgage money, together with costs, damages and interest, from the mortgagor and other properties of the mortgagor in the said

(1) N.-W. P., H. C. Rep., 1867, p. 150.

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villages "according to the condition of a separate deed of agreement executed to-day;" (6) that until the full payment of the mortgage money, the mortgaged property shall in every way remain liable for damages, interest and deficiency of profits. This deed was executed after the Transfer of Property Act, 1882, came into force. The definition of a usufructuary mortage according to that Act is to be found at clause (*d*) of section 58. Putting the terms above recited alongside of the definition, it is evident that the deed contains more than is provided for in clause (*d*). The portions of it where the mortgagor binds himself personally to pay the mortgage money in the event of disputes, &c., find no place in, and are directly contrary to the nature and essence of a transaction which is a pure usufructuary mortgage. So also is the clause which provides that the mortgaged property shall remain liable for damages, interest and deficiency of profits. It is also evident from the reference made to "the separate deed of agreement executed to-day" that the parties intended this latter document to be read with and interpreted by a document to be found at page 8 of the respondent's printed book. This document is termed a security bond. It recites that Syed Jafar Husen has given in mortgage to Chaudhri Ranjit Singh certain shares in certain villages— the shares and the villages in both deeds correspond exactly; that Syed Jafar Husen has taken a lease of the said shares in the said villages upon certain terms to be found in a *qabuliyat* executed the same day; that the lease runs from January 1838 up to January 1895, or until redemption of the mortgage; in other words, that as regards time it is coterminous with the mortgage. The deed then proceeds to state that for the satisfaction of the mortgagee in regard to payment of the lease money the mortgagor pledges and hypothecates in this security bond his equity of redemption over the mortgaged property and shares to which he was entitled in the mortgaged villages. It is this last portion of this deed which is cited in the mortgage deed and which under certain circumstances is to govern the parties to the mortgage-deed. If the two documents are read together, it is

evident that they deviate still further from the definition of a usufructuary mortgage as set out in clause (*d*) of section 58 of the Transfer of Property Act, 1882. It will be observed that the two other deeds, namely, the lease and *qabuliyat* have practically been called in aid of the mortgage transaction. One of those two documents will be found at page 5 of the respondent's printed book. The terms of this document also refer to the mortgage-deed, and they show that the intention of the parties was to enter into a transaction covered by the four deeds. In our opinion the four deeds must be read together before it can be fairly understood what the intentions of the contracting parties were. Indeed the learned counsel on both sides are at one upon the point that the deeds were intended to be and must be read together. The learned counsel for the appellant argued from them all that the intention of the parties was not to charge the property mentioned in the mortgage-deed with the principal amount or any portion of it. He drew our attention to the fact that there is no mention made in any of the deeds as to how the principal sum advanced was to be recovered after the expiry of the seven years, and also that the property charged, should any difficulty or dispute, &c., arise within the seven years, was property other than that covered by the mortgage deed. He referred particularly to the words in the end of the mortgage deed, wherein the mortgaged property is made liable for everything except the principal money. It was for these reasons that he contended that the deed was a pure usufructuary deed, and nothing more. The transaction between the parties stood, as he said, upon precisely the same footing as what is known in England as a Welsh mortgage, and he travelled into what is laid down in Ashburner's Treatise on Mortgages (see specially p. 168). He also referred us to the following cases:—*Teulon* v. *Curtis* (1), *Rankin* v. *Potter* (2) and *Cooper* v. *Cooper* (3). It is needless, however, to refer to English cases and English treatises, for we have the question in dispute

(1) Young's Reports, p. 610. (2) House of Lords' Reports for 1873, p. 128.
(3) House of Lords' Reports for 1875, p. 55.

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before us, in our opinion, sufficiently covered by the Transfer of Property Act, 1882, and by the general principles which have been uniformly followed by this Court for a long series of years. In 1879 a Full Bench of this Court, in *Phul Kuar* v. *Murlidhar* (1), in considering a deed which provided *inter alia* that if the mortgagor failed to pay the mortgage amount within the period of two years the mortgagee would be at liberty to recover the mortgage amount in any way he pleased, held, in spite of provisions in the same deed which recited that the mortgagee had been put in possession of the property mortgaged, and that the mortgagors intended to pay the mortgage money in a period of two years and get the property redeemed, that the transaction was in reality a simple mortgage-deed. In 1885, in the case of *Jugal Kishore* v. *Ram Sahai* (2), Straight, Officiating C. J., and Mahmood, J., agreed in holding that an instrument, the terms of which were far more in accord with the terms of the deed before us, was a combination of a simple mortgage and a usufructuary mortgage; that the shops were mortgaged as security for the debt; and that the plaintiff was entitled to maintain a suit to bring the property to sale. In 1888 in *Umrao Begam* v. *Vali-ullah* (3), Brodhurst and Mahmood, JJ., had a deed which they considered covered both the case of a usufructuary mortgage and of a hypothecation charge. From these and other cases which were cited to us, it is abundantly evident that this Court has always looked to the intention of the parties in construing a mortgage-deed, the terms of which were of a doubtful character; also that it has constantly recognized the fact that the covenants in mortgage-deeds of a mixed character and other than those expressly defined in section 58 of the Transfer of Property Act, 1882, may be given effect to in accord, as far as possible, with the covenants contained in them, and that where a deed is partly of the nature of a usufructuary mortgage and partly of the nature of simple mortgage, the mortgagee is entitled to bring the mortgaged property to sale under the conditions set out in the

(1) I. L. R., 2 All., 527. (2) Weekly Notes, 1886, p. 212.
(3) Weekly Notes, 1888, p. 171.

deed. Looking at the mortgage-deed and the security bond and reading them together, we are satisfied that they were intended to form one and the same transaction, that the intention of the parties was that the person and property, both that expressly contained in the mortgage deed and the further property set out in the security bond, were to be within the power and control of the mortgagee to bring to sale, if there was any default on the part of the mortgagor in the payment of the lease money.

Another question arose, namely, how far the mortgagee could in the present suit claim to include arrears of lease money for the years 1893 to 1896, for which he had instituted suits and obtained decrees prior to the institution of the present suit. Upon this point the learned advocate for the appellant admitted that the case *Altaf Ali Khan* v. *Lalta Prasad* (1), was against him, and we think it is. No other questions were argued before us. The result is that the appeal is dismissed with costs. We extend the time for payment of the mortgage money to the 31st of January 1899. The costs of the plaintiff will be included in the amount, upon non-payment of which the mortgaged property will be sold.

BANERJI, J.—I, too, have arrived at the same conclusion as my learned colleague. If the mortgage in this case is a purely usufructuary mortgage as defined in clause *(d)* of section 58 of the Transfer of Property Act, 1882, the plaintiff is not entitled, having regard to the provisions of section 67 clause *(a)* of that Act, to institute a suit for sale, and the present suit must be dismissed. The principal question which we have to determine in this appeal, therefore, is whether, as contended by the appellant, the mortgage made in favour of the plaintiff is a purely usufructuary mortgage, or, as urged on behalf of the plaintiff and held by the Court below, it is a mortgage which partakes of the nature both of a simple mortgage and of a usufructuary mortgage, and is a combination of both those kinds of mortgage.

(1) I. L. R., 19 All., 496.

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I am of opinion that the mortgage in this case is of the latter description. The mortgage deed is not artistically drawn. We must, therefore, look to all its provisions as a whole, to the other instruments which were executed at the same time and admittedly form parts of the same transaction, and to the surrounding circumstances, in order to gather the intention of the contracting parties. The document begins with the recital that the property mentioned in it was mortgaged and pledged. The vernacular words are "*rehn*" and "*girau*," both of which mean mortgage or pledge. It was argued that the words should be understood in the sense in which they are used in Muhammadan law, namely, to denote a usufructuary mortgage. I am unable to agree with this contention. The words were evidently used in the mortgage-deed in the sense in which they are used in common parlance in the Hindustani language. As ordinarily understood in that language they are generic terms denoting a mortgage, whatever the nature of that mortgage may be. They apply as much to a simple mortgage as to a usufructuary mortgage. The use of those words does not, in my opinion, help appellant. On the contrary, the fact that the deed begins by saying that the executant had "mortgaged and pledged all the aforesaid shares" for a lakh of rupees "for a term of seven years," coupled with the other recitals in the deed, raises the inference that the intention was to provide for the realization of the amount of the loan from the property itself and not from its usufruct only. The mortgage deed next provides for the payment of the mortgage money after seven years, and it contains a covenant to the effect that the mortgagee "will have the power to take back the mortgage money after the expiry of the term of seven years." This is a personal covenant to pay the mortgage money after the expiry of seven years—a covenant inconsistent with a usufructuary mortgage pure and simple. In a pure usufructuary mortgage as defined in clause *(d)*, section 58 of Act No. IV of 1882, the mortgagee takes possession of the mortgaged property and is authorised to retain such possession until payment

of the mortgage money, and to receive the rents and profits, and appropriate them in lieu of interest only, or of the principal only, or partly of principal and partly of interest. The mortgagee, so long as he remains in possession, has no right under the mortgage to claim the mortgage money, and the mortgagor undertakes no personal liability. But where the mortgage deed authorises the mortgagee to recover the mortgage money after a specified period or on demand, the transaction ceases to be a pure usufructuary mortgage of the kind contemplated by the Transfer of Property Act. It was held by the Madras High Court in *Ramayya* v. *Guruva* (1) that a mortgage which otherwise answers the definition of a usufructuary mortgage as contained in clause *(d)*, section 58 of Act No. IV of 1882, is not a usufructuary mortgage within the meaning of that Act if there is a covenant in it to pay the mortgage debt, and in the case of such a mortgage the mortgagee has a right to sue for sale. A Full Bench of that Court affirmed the same view in *Sivakami Ammal* v. *Gopala Suvundram Ayyan* (2). With these rulings I fully agree. This case is almost on all fours with the decision of this Court in *Jugal Kishore* v. *Ram Sahai* (3) in which a mortgage of the same description as the one in suit was held to be a combination of a simple and usufructuary mortgage. It is contended in this case that the mortgage deed does not in terms provide for the recovery of the mortgage money by sale of the mortgaged property; but, as I have said above, the deed not being artistically drawn, we must gather the intention of the parties from all the provisions taken as a whole, and from all the surrounding circumstances. In my opinion there is much force in the argument of the learned counsel for the respondent, that, all the four deeds executed on the same date being parts of the same transaction, the intention must be presumed to be the same in all of them, although the language employed in each deed to convey that intention may not

(1) I. L. R., 14 Mad., 232. (2) I. L. R., 17 Mad., 131.
(3) Weekly Notes, 1886, p. 212.

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be the same. There can be no doubt that under the other deeds executed on the same date as the mortgage deed the mortgaged property and the other property mentioned in those deeds were rendered liable for interest. It is also clear from the last clause of the mortgage deed that "until the full payment of the mortgage money" the mortgaged property was to remain liable for "damages, interest and deficiency of profits." It is unreasonable to infer that the intention was that, although the mortgagee would have the right upon the expiration of seven years to recover the mortgage money in cash, and, although he would be competent to realise "damages, interest and deficiency of profits" by sale of the mortgaged property, he would not be competent to touch that property, except to hold it for the realisation of interest only out of the usufruct, and that he would not have the right to cause that property to be sold for the realisation of the principal.

For these reasons I agree with my learned colleague in thinking that the Court below has rightly conceived the nature of the mortgage in this case, and that this appeal must be dismissed with costs.

Appeal dismissed.

Before Mr. Justice Banerji and Mr. Justice Aikman.

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SAHIB ALI AND OTHERS (PLAINTIFFS) *v.* SUBHAN ALI AND OTHERS (DEFENDANTS).*

Regulation No. XXXI of 1803, *section* 6—*Revenue-free grant—Settlement in favour of daughter purporting to render other lands than the lands settled liable in the hands of the settlor and his heirs for the revenue of the settled lands.*

One Bakhshish Ali in 1843 settled certain lands on his daughter Rahmat-un-nissa and covenanted that he and his heirs would pay the land revenue due on the estate so assigned along with the land revenue for their own estate. The deed of settlement then went on to provide that if at any time the heirs of the settlor, or whoever might be in possession of the rest of his estate, should demand from Rahmat-un-nissa, or the person in possession of the lands assigned

* Second appeal No. 119 of 1896 from a decree of Babu Sanwal Singh, Subordinate Judge of Allahabad, dated the 22nd November 1895, reversing a decree of H. David, Esq., Munsif of Allahabad, dated the 27th May 1895.