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instituted was continued as against him. That being so, no question of limitation could arise. The real point in the case is whether section 372 did apply to the case of the present appellant. He was the assignee of a decree which was a decree *nisi* for sale under section 88 of the Transfer of Property Act. He took that decree subject to its being made absolute by an order under section 89 of that Act. Until such order was made it cannot be said that the suit had come to an end. Therefore as he took the assignment *pendente lite*, the doctrine of *lis pendens* applies to his case. Section 372 was consequently applicable, and the appellant was not competent to raise any plea of limitation which, as I have said above, his assignors could not have put forward. Upon the other points which were discussed in this appeal I am in full accord with what has been said by the learned Chief Justice. I agree in dismissing the appeal.

Appeal dismissed.

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April 16.

Before Mr. Justice Knox and Mr. Justice Burkitt.

CHIMMAN LAL (DEFENDANT) *v.* BAHADUR SINGH (PLAINTIFF).*

Usufructuary mortgage—Mortgagee put into possession—Contemporaneous lease of mortgaged property to mortgagee—Lease and mortgage not one but separate transactions.

On September 18th, 1883, Chimman Lal by a usufructuary mortgage of that date, in consideration of a loan of Rs. 1,350, put Bahadur Singh into possession of certain property. He covenanted with the mortgagee to pay him interest at the rate of annas 14 per cent., which after deducting the Government revenue (which the mortgagor undertook to pay and did pay regularly), left the sum of Rs. 141-12 payable annually by the mortgagor to the mortgagee for interest. It was further agreed that the mortgagee should pay himself the interest from the profits of the mortgaged property; and further that if the amount of the profits in any year exceeded the sum payable as interest, the surplus should be applied by the mortgagee in reduction of the principal of the loan, and on the other hand that if the profits fell short of the sum payable for interest, the defendant-mortgagor would be liable for the balance and would pay it along with the mortgage money. A further clause permitted the mortgagee at any time he chose to call in the mortgage money, and to recover it with interest and costs from the mortgagor and the mortgaged property.

* Second Appeal No. 249 of 1899 from a decree of J. J. McLean, Esq., District Judge of Meerut, dated the 22nd December 1898, confirming the decree of Babu Nihal Chandar, Additional Subordinate Judge of Meerut, dated the 26th September 1896.

By an instrument of even date the mortgagor (who under the above mentioned usufructuary mortgage had put the mortgagee in possession) executed to the latter a qabuliat, or rent agreement, by which he acknowledged to have received from the mortgagee a lease of the mortgaged premises, to hold good up to the redemption of the mortgage, at an annual rental of Rs. 141-12, which he promised to pay by two equal half-yearly instalments, the rent, if not paid on fixed dates, to bear interest at the rate of 12 per cent. per annum. The qabuliat was drawn up strictly in the form of a lease between a landlord and a tenant, and set forth the remedies available to the lessor under section 36 of the Rent Act by ejectment in case of failure to pay the stipulated rent.

Held that under the circumstances set forth above the mortgage and the lease were two distinct transactions. A suit on the qabuliat would lie only in a revenue Court, and the plaintiff was not entitled to recover rent for more than three years from the date of his suit. *Altaf Ali Khan* v. *Lalta Prasad* (1) distinguished.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *R. Malcomson*, Munshi *Jang Bahadur Lal* and Babu *Sital Prasad Ghosh*, for the appellant.

Pandit *Sundar Lal* and Babu *Devendra Nath Ohdedar*, for the respondent.

KNOX and BURKITT, JJ.—In the suit out of which this second appeal has arisen the plaintiff-respondent sued for sale of certain property which had been mortgaged usufructuarily to him by the defendant-appellant on September 18th, 1883.

He also sued for "lease money and the interest thereon," making, with the principal for the loan, a total sum of Rs. 2,715, in default of payment of which he asked that the mortgaged property should be sold.

Both the lower Courts decreed the claim with a slight deduction. The defendant appeals.

It appears that on the date mentioned above the appellant-defendant, by an usufructuary mortgage of that date, in consideration of a loan of Rs. 1,350, put the plaintiff-respondent into possession of the property now sought to be sold. He covenanted with the plaintiff to pay him interest at the rate of 14 annas per cent., which after deducting the Government revenue (which the defendant undertook to pay and did pay regularly) left the sum of Rs. 141-12 payable annually by the defendant to the

(1) (1897) I. L. R., 19 All., 496.

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plaintiff for interest. It was further agreed that the plaintiff-mortgagee should pay himself the interest from the profits of the mortgaged property; and further that if the amount of the profits in any year exceeded the sum payable as interest, the surplus should be applied by the plaintiff-mortgagee in reduction of the principal of the loan; and on the other hand that if the profits fell short of the sum payable for interest, the defendant-mortgagor would be liable for the balance and would pay it along with the mortgage money. A further clause permitted the mortgagee at any time he chose to call in the mortgage money and to recover it with interest and costs from the mortgagor and the mortgaged property.

By an instrument of even date the mortgagor defendant-appellant (who under the abovementioned usufructuary mortgage had put the mortgagee in possession) executed to the latter a qabuliat, or rent agreement, by which he acknowledged to have received from the mortgagee a lease of the mortgaged premises, to hold good up to the redemption of the mortgage, at an annual rental of Rs. 141-12, which he promised to pay by two equal half-yearly instalments, the rent if not paid on fixed dates to bear interest at the rate of 12 per cent. per annum. The qabuliat is in the strictest form of a lease between a landlord and a tenant, and sets forth the remedies available to the plaintiff-respondent under section 36 of the Rent Act by ejectment of the appellant in case of failure to pay the stipulated rent on the due dates.

In framing his plaint the respondent ingeniously founded on both the documents described above. He takes the principal amount due from the usufructuary mortgage deed, but makes no claim for any interest as due under that instrument. For interest he turns to the qabuliat, and describing the rent payable under it as "lease money," and also as "profits due under the lease, that is, the interest on the mortgage money," which, he says, was realizable along with the mortgage money, he claims Rs. 1,365 as due. The reason why he has abandoned any claim to interest under the mortgage deed is evident. The interest payable under the mortgage was simple interest, while the rent due under the qabuliat carried interest at 12 per cent. on any unpaid arrear. The plaintiff moreover not merely claimed the 12 per cent. interest

but also compound interest thereon. We are surprised to see that both the lower Courts supported him in that matter.

For the appellant, it is contended that the plaintiff was not entitled to treat the two separate instruments as one transaction and to found one part of his claim on one document and the remainder on the other. For the respondent, reliance was placed on the case of *Altaf Ali Khan* v. *Lalta Prasad* (1). In that case there is one observation in which we fully concur, namely (on p. 498), that "each case must be decided with reference to its own peculiar circumstances."

The case now before us differs most materially from the reported case just cited. In the usufructuary mortgage deed of September 18th, 1883, there is nowhere any reference or allusion whatever to the lease. The latter in its turn in no way purports to be dependent on or to be a part of the mortgage transaction; and indeed the only reference it makes to the latter is in the provision that the lease is to expire on redemption of the mortgage. Different rights are given by the two instruments. The mortgage deed authorizes the mortgagee to recover his principal and interest from the mortgagor and the mortgaged property, while under the qabuliat the lessor, in order to recover arrears of rent, is authorized to make use of the provisions of the Rent Act for the purpose of ejecting the defendant on his failure to pay rent. We find ourselves unable, on the facts of this case, to say, as in *Altaf Ali Khan* v. *Lalta Prasad* (2), that "the lease was granted simply to provide a mode for realizing the interest payable on the mortgage," if that be the true test in such a case as we are considering.

On the contrary, the case seems to us to come well within the rule laid down in S. A. No. 1112 of 1894, decided on the 8th April, 1897, a case which, we think, ought to be reported.*

* The judgment in this case was as follows :—

EDGE, C. J., and BLAIR, J.—The defendant, Musammat Husan Jahan Begam, on the 27th May, 1880, granted a usufructuary mortgage to the plaintiff, the consideration being an advance of Rs. 1,500. It was provided in the mortgage that the mortgagee should take all the profits from the mortgaged premises in lieu of interest; it was also provided that should the mortgagee be disturbed in possession, or deprived of possession, or should it appear that

(1) (1897) I. L. R., 19 All., 496. (2) (1897) I. L. R., 19 All., 496.

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The facts of that case are almost on all fours with those of the present case. It was there held that the lease was a lease, and operated as such to establish the relationship of landlord and tenant between the parties. It was there held that in suing on the rent agreement in a civil Court the plaintiff had sued in a Court which had no jurisdiction to entertain that portion of the claim. So in the present case we find that the effect of the qabuliat was to establish between the parties the relationship of landlord and tenant. We find that that relationship did exist between them, and that rent was paid for a long series of years by appellant to respondent, the payment being recorded on the back

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the property was already mortgaged, the mortgagee should have a remedy by suit against the mortgagor and against the mortgaged property; that is, on the happening of any of those events, the usufructuary mortgagee was given a right to bring a suit for sale of the mortgaged premises, which otherwise, as a usufructuary mortgagee, he could not bring under the Transfer of Property Act, 1882. It was also provided that if the mortgagor failed to pay on demand, the mortgagee might bring a suit against the mortgagor.

As we construe the deed, it was not intended to give to the mortgagee a right to sue for sale merely in the event of the mortgage money not being paid on demand: in that case the mortgagee was left to his ordinary remedy to recover his money, which would not be by a suit for sale. One can understand the reason why the mortgagee was given more extensive powers in one case than in the other. He was to be the mortgagee in possession, taking the whole of the profits into his own hands for his own benefit in lieu of interest. It was reasonable that he should, if undisturbed in possession and not affected by any prior mortgage, be left to the ordinary remedies of a usufructuary mortgagee; it was also reasonable that the parties should agree that in case of disturbance in possession or complications arising from a previous mortgage having been granted, the mortgagee should be entitled to such benefit as he might obtain by a suit for sale of the mortgaged property. If a right to bring a suit for sale had not been expressly given, in certain events, to this usufructuary mortgagee, the only remedy which he could have had, in case the mortgagor, or any one else claiming a title, had disturbed him, would have been the remedy provided by section 68 of the Transfer of Property Act, 1882.

This mortgage cannot be considered as anything else than a usufructuary mortgage, containing the special provisions to which we have referred. Now on the 28th May, 1880, the mortgagee having, as is recited in the mortgage, obtained possession, granted a lease of the mortgaged premises to the mortgagor for the term of the mortgage at a yearly rent of Rs. 150, payable half-yearly in Aghan and Baisakh. The mortgagor entered under that lease and attorned to the mortgagee as his tenant, and paid him a considerable amount

of the qabuliat. In S. A. No. 1112 of 1894, cited above, the learned Judges, acting under sections 206, 207, and 208 of the Rent Act (as the first appeal had been heard by the District Judge), gave the plaintiff a decree for the three years' rent not barred by limitation. So in the present case we think all that the plaintiff can claim is the rent of three years previous to suit. Our decree for that rent will be a money decree only, as the qabuliat nowhere makes the rent reserved in it chargeable on the mortgaged property. For this result plaintiff has only himself to thank. Being entitled to simple interest on the mortgage bond, he deliberately omitted to sue for such relief, and in lieu of

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of rent from time to time. For some years however the mortgagor-lessee has made default in payment of rent, and the mortgagee lessor, the plaintiff here, has brought this suit as a suit for sale of the mortgaged premises, claiming to sell them, not only for the principal moneys due, but also for the sums in arrear, which were due as rent.

The transaction between the parties, that is, the granting of a usufructuary mortgage and the subsequent granting of a lease to the mortgagor of the mortgaged premises, is one exceedingly common in this part of India; whether it may be known in other parts of India we do not know. The grant of such a lease by a mortgagee to his mortgagor has been invariably treated, not only in the civil Courts and in the Courts of revenue, but outside the Courts in these Provinces, as a transaction of lease, and as putting the parties in exactly the same position as that in which they would have stood if, instead of having been mortgagor and mortgagee, they were the zamindar and any other person taking a lease of the land.

The Subordinate Judge dismissed the suit altogether. The District Judge appears to us to have misunderstood the whole nature of the transaction. In reference to the deed he says:—"The deed above would be a usufructuary mortgage, but as next day a qabuliat was executed by the mortgagor, possession was clearly not given, and the deed becomes a simple mortgage." A usufructuary mortgage does not become a simple mortgage if possession is not given. It is recorded in the deed that possession was given, and beyond that, over three years' rent was actually paid; and further the mortgagee having possession granted a lease to the mortgagor of the mortgaged premises, and the mortgagor attorned to him The mortgagee was in possession through his tenant, the mortgagor. The mortgagee could have granted that lease to whomsoever he liked, but for his own purposes, possibly for the convenience of all parties, he took the mortgagor as his tenant and granted the lease to him.

The District Judge gave the mortgagee a decree for sale for the principal, for rent due, and for costs. The defendant, the mortgagor, has brought this appeal. It is contended on behalf of the defendant that none of the events

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it he sued in a civil Court for rent due from an agricultural tenant (which that Court had no jurisdiction to give him), and he did so because the rent reserved by the lease carried interest, which he further interpreted to mean compound interest.

We allow this appeal. We set aside the decree of the lower Courts. We give to the plaintiff-respondent a decree for recovery of the principal sum of Rs. 1,350 by sale of the mortgaged property under section 88 of the Transfer of Property Act, allowing to the mortgagor six months from to-day within which to avoid sale by paying that amount to the plaintiff or into Court. We

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having happened, which would have entitled the mortgagee to bring a suit for sale, he was not entitled to a decree for sale. In our opinion that contention must prevail. The condition in the mortgage, by which the mortgagee was entitled to bring a suit for sale, depended for its coming into force on the happening of certain events, none of which have happened. The fact that the mortgagee has put the mortgagor into possession as his tenant is not a disturbance of the mortgagee's possession within the meaning of the condition. It is further contended that the mortgagee has by reason of limitation lost all his remedies by suit for the principal money, it being contended that articles 59 and 116 of the second schedule of the Indian Limitation Act, 1877, apply in this case. In our opinion neither of these articles applies. The demand mentioned in the mortgage deed was obviously intended by the parties to be an actual demand. It was contemplated by the parties that the transaction should go on until the mortgagee should make a demand at the end of a year, or until at the end of a year the mortgagor should redeem. In our opinion the suit, if it were a suit to recover the principal money, would not be barred by limitation. It has been contended, and we think successfully, that the mortgagee is not entitled to sue for interest as such. He obtained under his mortgage possession of the mortgaged premises and a right to take the profits in lieu of interest. If he had granted the lease of the 28th May, 1880, to any third person instead of to the mortgagor, it is obvious, if he failed to get the rent out of such person, he could not claim the interest of the principal money from the mortgagor; that the person whom the mortgagee selected as his tenant happened to be the mortgagor cannot alter the position. The morgatgee-lessor is entitled to sue the mortgagor-lessee for rent payable under the lease so far as his remedy for that rent is not barred by limitation. Now the Court in which he ought, in accordance with section 93 of Act No. XII of 1881, to have brought his suit for rent was a Court of revenue and not a civil Court; and so far as this suit may be treated for the purpose of settling matters between the parties as a suit for rent, it is subject to the limitation provided by section 94 of Act No. XII of 1881, that is, to a limitation of three years. It is practically immaterial for the purposes of our jurisdiction whether

give the plaintiff further a decree for rent of the three years previous to the date of the institution of the suit at the rate of Rs. 141-12 in each year 1301, 1302 and 1303 Fasli, with simple interest thereon at 12 per cent. per annum up to date of suit, and at 6 per cent. per annum from date of suit up to realization.

We allow the appellant his costs in this Court and in the two lower Courts, which he may set off against the sum we have decreed against him for rent.

Appeal decreed.

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the suit was brought for rent in the right or wrong Court (at least so we read sections 206, 207, and 208 of Act No. XII of 1881) as this case went on appeal to the District Judge.

We propose to give the plaintiff a decree for what, in our opinion, he would have been entitled to if he had sought his proper remedy, although we must observe that his remedy for recovery of the principal money was one which he could only have sought in a civil Court, and that his remedy to recover such rent as was not time-barred was one which he could only have sought in a Court of revenue.

We set aside the decree of the District Judge, and make a decree for money in favour of the plaintiff for Rs. 1,500, principal money due, and we give him a decree for rent, which became due and payable within three years of the date of the suit, and for interest at the rate of 6 per cent. per annum on that rent in this way:—

He will get a decree for Rs. 450 rent: he will be allowed interest on Rs. 75 from Baisakh of 1889: interest at 6 per cent. on Rs. 75 from Aghan 1889: interest on Rs. 75 at the same rate from Baisakh 1890: interest at the same rate on Rs. 75 from Aghan 1890; interest at the same rate on Rs. 75 from Baisakh 1891: interest at the same rate on Rs. 75 from Aghan 1891 to the date of our decree. He will have interest on Rs. 1,500 and on the total amount of our decree at 6 per cent. till liquidation.

We have come to the conclusion that inasmuch as the plaintiff's suit was untenable in the form in which he brought it, and inasmuch as part of the relief which we have granted to him he could not have obtained except in a Court of revenue by a suit in that Court if it had not been for sections 206—208 of Act No. XII of 1881. Each party must bear his own costs of this litigation in all Courts.