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learned counsel for the respondents, go to show that in this case section 575 of the Code of Civil Procedure is not applicable. The order of the Court, therefore, is that the appeal be allowed, the decree of this Court, and also the decree of the first appellate Court, be set aside, and the case remanded to the lower appellate Court under the provisions of section 562 of the Code of Civil Procedure for the determination of the issues which have as yet not been decided. The costs of this appeal will abide the event.

*Appeal decreed and cause remanded.*

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May 21.

*Before Mr. Justice Blair and Mr. Justice Banerji.*

BHAGWAN DAS (PLAINTIFF) v. BHAWANI AND ANOTHER (DEFENDANTS).  
*Act No. IV of 1882 (Transfer of Property Act), sections 96 and 97—Civil Procedure Code, section 295—Mortgage—Suit for sale of entire property by holder of usufructuary and simple mortgages over the same property.*

A mortgagee held several simple mortgages over properties *A* and *B*, and also a usufructuary mortgage of prior date over property *B*. Held that the mortgagee was not entitled to bring to sale the property covered by his simple mortgages, subject to the usufructuary mortgage held by him, nor could he bring to sale the whole property for the aggregate amount of his mortgages, simple and usufructuary.

THE facts of this case are as follows :—

One Tara Singh owned certain property which was entered in the khewat as No. 8, and also other property described in the khewat as No. 4. On the 9th of November 1885 he made a usufructuary mortgage of the first-mentioned property to one Bhagwan Das, and subsequently five simple mortgages including both properties to the same mortgagee. Prior to all these mortgages Tara Singh had in 1880 made a mortgage of the same property in favour of Ganga Ram and others, who obtained a decree upon that mortgage and assigned the decree to Narain Prasad. The suit out of which this appeal arose was brought for sale upon the five simple mortgages mentioned above. The plaintiff alleged that he was the mortgagee in possession of the property entered in khewat as No. 8, and was not entitled to bring

\* Second Appeal No. 537 of 1901 from a decree of H. D. Griffin, Esq., District Judge of Aligarh, dated the 21st of February 1901, modifying a decree of Maulvi Ahmad Ali, Subordinate Judge of Aligarh, dated the 27th of June 1900.

that property to sale subject to his prior usufructuary mortgage. He therefore asked the Court to sell the whole of the property comprised in the simple mortgages free from his demand under the usufructuary mortgage, and to grant him out of the sale proceeds the amount due upon the usufructuary mortgage. He also offered to redeem the prior mortgage the rights under which had been acquired by Narain Prasad by his purchase from Ganga Ram and others. The relief which the plaintiff sought in his plaint was that the mortgagor should be ordered to pay not only the amount due upon the five simple mortgages but also the amount of the usufructuary mortgage, and that in the event of his failing to do so the whole of the mortgaged property should be sold for the realization of the said amounts, and also of the amount which the plaintiff might have to pay to Narain Prasad.

The Court of first instance (Subordinate Judge of Aligarh) granted the plaintiff a decree, being of opinion that under section 295 of the Code of Civil Procedure, the plaintiff was entitled to waive his rights under the usufructuary mortgage, to cause the property to be sold free from that mortgage, and to participate in the proceeds of the sale both in respect of his simple mortgages and of his usufructuary mortgage.

On appeal the lower appellate Court (District Judge of Aligarh) varied the decree of the Court of first instance and dismissed so much of the claim as sought to realize the amount of the usufructuary mortgage and prayed for the sale of the property comprised in that mortgage for the realization of that amount as well as of the amount due upon the simple mortgages. The plaintiff thereupon appealed to the High Court.

Pandit *Sundar Lal* and Pandit *Moti Lal Nehru*, for the appellant.

Babu *Jogindro Nath Chaudhri* and Babu *Satya Chandra Mukerji*, for the respondents.

BLAIR and BANERJI, JJ.—The facts which gave rise to the suit out of which this appeal has arisen, are these:—One Tara Singh owned certain property which was entered in the khewat as No. 8, as also certain other property which was recorded as No. 4 in the khewat. He made a usufructuary mortgage of the

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property first mentioned in favour of the plaintiff on the 9th of November, 1885. Subsequently he made five simple mortgages of the same property, and also of the property entered in the khewat as No. 4, in the plaintiff's favour. Prior to all these mortgages he had in 1880 made a mortgage of the same property in favour of Ganga Ram and others, who obtained a decree upon that mortgage and assigned the decree to the second defendant Narain Prasad. The present suit was brought for sale upon the five simple mortgages made in the plaintiff's favour. He alleged in his plaint that he was the mortgagee in possession of the property entered in khewat as No. 8, and was not entitled to bring that property to sale subject to the said prior usufructuary mortgage. He, therefore, asked the Court to sell the whole of the property comprised in the simple mortgages free from his demand under the usufructuary mortgage, and to grant him out of the sale proceeds the amount due upon his usufructuary mortgage. He also offered to redeem the prior mortgage acquired by the second defendant Narain Prasad under his purchase from Ganga Ram and others. The relief which the plaintiff sought in his plaint was that the mortgagor should be ordered to pay not only the amount due upon the five simple mortgages but also the amount of the usufructuary mortgage, and that in the event of his failing to do so the whole of the mortgaged property should be sold for the realization of the said amounts, and also of the amount which the plaintiff might have to pay to Narain Prasad.

The Court of first instance granted a decree to the plaintiff, being of opinion that under section 295 of the Code of Civil Procedure the plaintiff was entitled to waive his rights under his usufructuary mortgage, to cause the property to be sold free from that mortgage, and to participate in the proceeds of the sale, both in respect of his simple mortgages and his usufructuary mortgage. The lower appellate Court has varied this decree of the Court of first instance and dismissed so much of the claim as seeks to realize the amount of the prior usufructuary mortgage and prays for the sale of the property comprised in that mortgage for the realization of that amount as well as of the amount due upon the simple mortgages.

The plaintiff has preferred this appeal, and the first contention raised on his behalf is that the appeal to the lower appellate Court was not presented within the period prescribed by law. The basis for this contention is that the vakalatnama, by virtue of which the appeal was lodged in the lower appellate Court, did not bear the mark of Musammât Bhawani, respondent. This contention, which was considered by the lower appellate Court, has, we think, been sufficiently disposed of by the finding of that Court that the lady had, as a matter of fact, appointed the pleader to file the appeal on her behalf. The next contention raised is that the plaintiff was competent to sue for the sale of the property comprised in the usufructuary mortgage free from that mortgage, and that the Court below was wrong in dismissing the suit in respect of the property to which that mortgage relates. This contention also is, in our opinion, untenable. It is manifest that the usufructuary mortgage in favour of the plaintiff conferred upon him the right only to remain in possession of the mortgaged property, and gave him no power to sell the mortgaged property in the event of the amount of the mortgage not being paid within the time specified. The plaintiff is not, therefore, entitled, having regard to the provisions of section 67 of Act No. IV of 1882, to sue for the sale of the property, the subject of the usufructuary mortgage, for the recovery of the amount of that mortgage. According to the ruling of the Full Bench in *Mata Din Kasodhan v. Kazim Husain* (1) mortgaged property cannot be sold subject to a prior mortgage. Therefore the plaintiff is not entitled to sell under his simple mortgages the property comprised therein subject to his prior usufructuary mortgage. The learned vakil for the appellant contends that under section 96 of the Transfer of Property Act the plaintiff was entitled to ask the Court to sell the property free from the prior usufructuary mortgage. In our opinion that section cannot apply to a case of this kind. It relates to a sale free from a prior mortgage where under the terms of that mortgage the mortgagee would be entitled to bring the mortgaged property to sale and to participate in the proceeds of the sale. This is clear from the provisions of section

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(1) (1891) I. L. R., 13 All., 482.

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97. A usufructuary mortgagee under a mortgage deed which does not confer upon him a right to sell is not entitled to sue for the sale of the mortgaged property, and therefore he can in no event share in the proceeds of the sale of the property to which his mortgage relates. Consequently he cannot ask the Court under section 96 to sell the property free from such mortgage. It is urged on behalf of the plaintiff that as a puisne mortgagee may redeem a prior mortgage, and on doing so add the amount of that mortgage to the amount of the subsequent mortgage, and sell the property comprised in both mortgages for the realization of the aggregate amount, the plaintiff as puisne mortgagee may do the same. This would have been a valid contention had the prior mortgage not been a usufructuary mortgage in favour of the plaintiff himself. As the plaintiff has no right to sell under his usufructuary mortgage, he would be circumventing the law if he were allowed to add the amount of his prior mortgage to that of the subsequent mortgage and sell the mortgaged property for the amounts of both the mortgages. This he cannot be allowed to do. On this point we have an unreported ruling of a Bench of this Court in S. A. No. 1237 of 1900 decided on the 4th of August, 1902. The Court below was, in our judgment, right in refusing to allow the plaintiff to add the amount of his prior usufructuary mortgage to the amounts due upon his simple mortgages, and to order the sale of the property comprised in the first mortgage for the recovery of the amount either of the usufructuary mortgage or of the subsequent simple mortgages. Had the plaintiff abandoned his rights under his usufructuary mortgage, and the property to which the simple mortgages relate had thus been relieved of all liability under the prior usufructuary mortgage, the case might have been different. But the plaintiff does not wish to abandon his rights under his prior usufructuary mortgage. The learned vakil for the appellant referred to the Full Bench ruling in *Sundar Singh v. Bhola* (1). That was a case in which there were two simple mortgages upon the same property in favour of the same person, and it was held that there was no bar to a separate suit for sale being brought upon either

of the two mortgages. That is not the case here. We have before us a usufructuary mortgage which does not give the mortgagee a right to sell. So long as that mortgage exists, the property included in the subsequent mortgages, which is also comprised in the prior mortgage, cannot be sold subject to that mortgage. It might be sold free from that mortgage if the mortgage had been abandoned. But it cannot be sold, as we have already said, for the realization of the amount of the prior mortgage or subject to that mortgage. Consequently it cannot be sold, as has been rightly held by the Court below, for the recovery of the amount of the subsequent mortgages also. We think there is no force in this appeal, and accordingly dismiss it with costs.

*Appeal dismissed.*

*Before Mr. Justice Aikman.*

KASUMRI (JUDGMENT-DEBTOR) v. BENI PRASAD AND ANOTHER  
(DECREE-HOLDERS).\*

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1903  
May 22.

*Civil Procedure Code, section 37—Execution of decree—Limitation—Application to certify payment out of Court—Application signed by general attorney, decree-holder being within the jurisdiction—"Recognized agent."*

*Held* that an application under section 253 of the Code of Civil Procedure to certify an adjustment of a decree made out of Court, although an application to the Court to take a step in aid of execution of the decree, is not an application made in accordance with law, if it is made by the general attorney of the decree-holder at a time when the decree-holder himself is residing within the jurisdiction of the Court executing the decree. *Murari Lal v. Umrao Singh* (1) referred to. *Lachman Bibi v. Patni Ram* (2) distinguished.

THIS was an appeal arising out of proceedings in execution of a decree. The decree was obtained on the 5th of February 1896. The decree-holders applied for execution on the following day, but their application was dismissed for default on the 23rd of May 1896. On the 3rd of February 1899, an application was made to the executing Court purporting to be under the first clause of section 253 of the Code of Civil Procedure certifying a payment made by the judgment-debtor towards satisfaction

\* Second Appeal No. 1010 of 1901, from a decree of Pandit Girraj Kishore Datt, Officiating Subordinate Judge of Saharanpur, dated the 31st of July, 1901, confirming an order of Babu Krishn Sewak Lal, Munsif of Deoband, dated the 16th of March, 1901.