

Muhammad Yusuf (1), the principle which prevailed before Act No. IV of 1882 came into force is the principle to be deduced from the last paragraph of section 60 of that Act. That principle is this: Where a mortgagee acquires a part of the mortgaged property and thus a fusion takes place of the rights of the mortgagee and the mortgagor in the same person, the indivisible character of the mortgage is broken up, and one of several mortgagors may in such a case redeem his own share only on payment of a proportionate part of the mortgage-money, but he cannot compel the mortgagee to allow him to redeem the shares of other persons in which he is not interested. That is the effect of the rulings to which I have referred, and I am bound to follow them. The case of *Mora Joshi v. Ramchandra* (2) to which the learned counsel for the appellants has referred is distinguishable, as in that case only one of several mortgagees had purchased a part of the mortgaged property, and the indivisible character of the mortgage had not been destroyed.

The appeal is accordingly dismissed with costs.

Appeal dismissed.

*Before Sir John Stanley, Knight, Chief Justice and Mr. Justice
Sir William Burdett.*

KASHI RAM (PLAINTIFF) v. SARDAR SINGH AND OTHERS (DEFENDANTS).^{*}
Construction of document—Mortgage—Usufructuary mortgage with personal covenant for payment of the mortgage money—Such personal covenant not conferring a right of sale.

Where a mortgage is in other respects a usufructuary mortgage, the insertion therein of a personal covenant to pay the mortgage-debt on demand unaccompanied by any hypothecation of the property the subject of the mortgage cannot alter the character of the mortgage and give the mortgagee a right to sell the mortgaged property in the event of non-payment of the mortgage debt. *Jafar Husen v. Ranjit Singh* (3) distinguished, *Ramayya v. Guruva* (4) and *Sivakami Ammal v. Gopala Savundram Ayyan* (5) distinguished from.

^{*} Second Appeal No 1197 of 1903 from a decree of W. F. Kirton, Esq., District Judge of Farrukhabad, dated the 7th of September 1903, confirming a decree of Pandit Bai Indir Narain, Subordinate Judge of Fatehgarh, dated the 22nd of July 1903.

(1) (1894) I. L. R., 17 All., 63. (3) (1898) I. L. R., 21 All., 4.
(2) (1890) I. L. R., 15 Bom., 24. (4) (1890) I. L. R., 14 Mad., 232,
(5) (1893) I. L. R., 17 Mad., 131.

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THIS appeal arose out of a suit for sale of a share in mauza Nagla Hallu for the realization of money due under a mortgage executed on the 17th of April 1877 by Pitam Singh, the ancestor of the defendants Nos. 1 to 28. The mortgage was primarily a usufructuary mortgage, and the principal defence raised was that under its terms the mortgaged property could not be brought to sale. The provisions contained in the deed in suit were substantially the following. By it the mortgagor mortgaged with possession for two years his share of the village in question and declared that he had given up possession of the mortgaged property and put the mortgagee into possession. He undertook to have mutation of names effected in favour of the mortgagee in the Revenue Court. Then follows a covenant on the part of the mortgagor that if he redeem the property, he will do so in the month of Jeth in any year. The provision for the payment of interest was that the mortgagee should take the amount of the interest out of the net profits of the property, and if the amount of profits should exceed the interest then apply the surplus towards the payment of principal; but if the profits were not sufficient for the payment of the interest, then the mortgagor should at the end of each year pay to the mortgagee the balance of interest remaining unsatisfied. Then towards the end of the deed there is a covenant on the part of the mortgagor to pay the mortgage debt on demand.

The Court of first instance (Subordinate Judge of Farrukhabad) gave effect to the mortgagees' contention that the mortgagee did not admit of the sale of the mortgaged property and dismissed the suit, and on appeal this decree was affirmed by the District Judge of Farrukhabad. The plaintiff thereupon appealed to the High Court.

Munshi *Gulzari Lal*, for the appellants.

The Hon'ble Pandit *Sundar Lal* and Munshi *Mangul Prasad Bhargava*, for the respondents.

STANLEY, C.J. and BURKITT, J.—This is a second appeal in a suit brought by the plaintiff for recovery of the amount due to him on foot of a mortgage of the 17th April, 1877, of a share in the village of Nagla Hallu by sale of the mortgaged property. The Court of first instance held that the mortgage

was a usufructuary mortgage and that the plaintiff was not, therefore, entitled to bring the property to sale. The lower appellate Court confirmed the decision of the Court below.

The question before us depends upon the proper construction to be placed upon the mortgage. If it is purely a usufructuary mortgage within the definition of such given in section 58 of the Transfer of Property Act, it is clear that the plaintiff appellant cannot maintain a suit for sale. We have before us a translation of the document. By it the mortgagor mortgaged with possession for two years his share of the village in question and declared that he had given up possession of the mortgaged property and put the mortgagee into possession. He undertook to have mutation of names effected in favour of the mortgagee in the Revenue Court. Then follows a covenant on the part of the mortgagor that if he redeem the property, he will do so in the month of Jeth in any year. The provision for the payment of interest was that the mortgagee should take the amount of the interest out of the net profits of the property, and if the amount of profits should exceed the interest then apply the surplus towards the payment of principal; but if the profits were not sufficient for the payment of the interest, then the mortgagor should at the end of each year pay to the mortgagee the balance of interest remaining unsatisfied. Then towards the end of the deed there is a covenant on the part of the mortgagor to pay the mortgage debt on demand. It is clear from a perusal of this document that it is a mere usufructuary mortgage, unless it be the case that the covenant on the part of the mortgagor for payment of the mortgage debt on demand takes it out of the category of usufructuary mortgages.

The appellant relies upon several decisions of the Madras High Court as establishing that a covenant by the mortgagor for payment of the mortgage debt, although the mortgage in other respects answers the definition of a usufructuary mortgage, takes the mortgage out of the category of simple usufructuary mortgages and enables the mortgagee to bring the property to sale. This was so decided in the case of *Ramayya v.*

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Guruva (1) and in the Full Bench case of *Sivakami Ammal v. Gopala Savundram Ayyan* (2).

We find ourselves unable to follow these decisions. It appears to us that a mere personal covenant to pay the mortgage debt unaccompanied by a hypothecation of the property does not give a usufructuary mortgagee a right of sale. So far as such a document is a mortgage, it is a usufructuary mortgage. The mere insertion in the document of a personal covenant on the part of the mortgagor to pay the mortgage debt on demand cannot, we think, alter the nature of the deed in other respects and change what is on the face of it a usufructuary mortgage into a mortgage of another character. If there were anything to be found in the deed indicating an intention on the part of the mortgagor to charge the mortgaged property with the payment of the mortgage debt, the case would be otherwise. Such was the case of *Jafar Husen v. Ranjit Singh* (3). In that case the terms of the document were not clear and admitted of more than one interpretation, and therefore it was necessary to gather the real intention of the parties from their conduct and from the effect given to the deed before the commencement of the dispute out of which the suit arose. The deed contained a provision that the mortgagee should be entitled to demand repayment of the mortgage debt after the expiration of the term of the mortgage and that "if any difficulties or obstructions were placed in the way of the mortgage debt," the mortgagee should be at liberty to recover the debt together with costs, damages and interest from the mortgagor and other properties of the mortgagor, and further, that, until the full payment of the mortgage debt, "the mortgaged property should in every way remain liable for damages, interest and deficiency of profits." It was held by our brothers Knox and Banerji that the intention of the parties was that the person and property of the mortgagor, 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 default was made in payment of the mortgage debt. In the

(1) (1890) I. L. R., 14 M.d., 232. (2) (1893) I. L. R., 17 Mad., 131.

(3) (1898) I. L. R., 21 All., 4.

course of his judgment our brother Banerji expressed his approval of the rulings of the Madras High Court to which we have referred, but this was merely *obiter*. It was not necessary in that case to determine the correctness of those rulings having regard to the language contained in the mortgage deed indicating an intention that the mortgaged property should remain liable for payment of the mortgage debt. It appears to us in the case before us that so far as the document sued on affects the land of the mortgagor, it is a usufructuary mortgage pure and simple, and we are unable to see that the insertion in it of a purely personal covenant on the part of the mortgagor to pay the mortgage debt in any way alters the nature of the mortgage itself. For these reasons we think that the conclusions arrived at by the Courts below were correct, and we dismiss the appeal with costs.

Appeal dismissed.

Before Sir John Stanley, Knight, Chief Justice and Mr. Justice Sir William Burkitt.

PHANI SINGH (DEFENDANT) *v.* NAWAB SINGH AND OTHERS
(PLAINTIFFS).*

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July 28.

Joint property—Exclusive dealing with joint property by one of the co-owners—Remedy of the other co-owners—Form of decree.

On the death of a tenant of land which belonged to several joint owners one of the co-owners obtained exclusive possession of the tenant's holding and had his name recorded in the mutation department as owner. The other co-owners sued for joint possession to the extent of their interest in the land, and they asked also for interest *pendente lite* and future interest and costs of suit and for no further relief.

Held that the decree to which the plaintiffs were entitled was a decree declaring that they and the defendant were joint owners of the land, and that the plaintiffs were, as such joint owners, entitled to an account of the profits of the land. But the plaintiffs were not entitled to an injunction restraining the defendant from dealing with the land without the plaintiffs' consent. *Bhola Nath v. Buskin* (1), *Ram Jatan Shukul v. Jaisar Shukul* (2), *Rahman Chaudhri v. Salamat Chaudhri* (3), *Jagar Nath Singh v. Jai Nath Singh* (4), *Ram Sarup v. Gulzar Banu* (5) and *Watson & Co. v. Ramchund Dutt* (6) referred to. *Nanhi Devi v. Daulat Singh* (7) in part overruled.

* Appeal No. 15 of 1905, under section 10 of the Letters Patent.

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| (1) Weekly Notes, 1894, p. 127. | (4) (1904) I. L. R., 27 All., 88. |
| (2) Weekly Notes, 1894, p. 166. | (5) Weekly Notes, 1905, p. 160. |
| (3) Weekly Notes, 1901, p. 48. | (6) (1890) I. L. R., 18 Calc., 10. |
| (7) Weekly Notes, 1905, p. 119. | |

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