

on the security of it, and was treated by the family, including the plaintiff herself, as its absolute owner.

For these reasons we see no reason to differ from the Court below in the view at which it arrived, and therefore dismiss the appeal with costs.

Appeal dismissed.

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Before Mr. Justice Banerji.

KALLAN KHAN AND OTHERS (PLAINTIFFS) v. MARDAN KHAN AND
OTHERS (DEFENDANTS).*

Act No. IV of 1882 (Transfer of Property Act), section 60—Mortgage—Effect of mortgagee purchasing part of the property mortgaged—Redemption.

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. *Kuray Mal v. Puran Mal* (1) followed. *Lachmi Narain v. Muhammad Yusuf* (2) referred to. *Mora Joshi v. Ramchandra Dinkar Joshi* (3) distinguished.

THIS was a suit for redemption of mortgage brought under the following circumstances. The mortgage was made by one Shahab-ud-din on the 10th of May 1872 in favour of Ali Muhammad Khan, the predecessor in title of defendants Nos. 1 to 8. Subsequently a portion of the mortgaged property was purchased by the mortgagee, and again another portion of the mortgaged property was purchased by Kallan Khan and others from the heirs of the mortgagor. These purchasers then sued for redemption claiming a right to redeem not only the property which they had purchased, but also the remainder of the mortgaged property. The mortgagee resisted the claim on the ground, amongst others, that the plaintiffs were not entitled to redeem a larger share than that which they had purchased. The Court of first instance (Munsif of Sambhal) accepted this contention and made a decree in the plaintiffs favour for

* Second Appeal No 314 of 1904, from a decree of Pandit Giraj Kishore Dat, Subordinate Judge of Moradabad, dated the 6th of January 1904, confirming a decree of Pandit Mohan Lal Sandal, Munsif of Sambhal, dated the 23rd of July 1903.

(1) (1879) I. L. R., 2 All., 565. (2) (1894) I. L. R., 17 All., 63.
(3) (1890) I. L. R., 15 Bom., 24.

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redemption of the portion of the mortgaged property purchased by them on payment of a proportionate part of the mortgage money, and this decree was in appeal upheld by the District Judge of Moradabad. The plaintiffs appealed to the High Court, renewing their contention that they were entitled to redeem the rest of the mortgaged property also.

Mr. *Ishaq Khan*, for the appellants.

Maulvi *Muhammad Zahir*, for the respondents.

BANERJI, J.—This appeal arises out of a suit for the redemption of a mortgage made on the 10th of May 1872 by one Shahab-ud-din in favour of the predecessor in title of the defendants Nos. 1 to 8. It appears that a part of the mortgaged property was purchased by the mortgagee. The plaintiffs are purchasers of a portion of the remainder from the heirs of the mortgagor, who are defendants Nos. 9 and 10. The present suit was brought to redeem not only the share which the plaintiffs had purchased, but also the remainder of the mortgaged property, which belongs to defendants Nos. 9 and 10, and which has not been purchased by the mortgagee. The mortgagee resisted the claim on the ground, among others, that the plaintiffs were not entitled to redeem a larger share than that which they had purchased. This contention prevailed in the Courts below, which have made a decree in the plaintiffs' favour for redemption of the portion of the mortgaged property purchased by them on payment of a proportionate part of the mortgage-money. The plaintiffs contend in this appeal that they ought also to have been granted a decree in respect of the remainder of the share now belonging to defendants Nos. 9 and 10, although they (the plaintiffs) had no interest in it. It was held by this Court in *Kuray Mal v. Puran Mal* (1) that where the mortgagee had purchased a portion of the mortgaged property and thereby broken up the joint character of the mortgage, the person interested in a part of the remainder of the mortgaged property was not entitled to redeem anything beyond his own share against the will of the mortgagee. This ruling was, it is true, made before Act No. IV of 1882 came into operation, but, as observed in *Lachmi Narain v.*

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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