

1908
February 7.

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

NARPAT AND ANOTHER (DEFENDANTS) v. RAM SARAN DAS
(PLAINTIFF) *

Act No. IV of 1882 (*Transfer of Property Act*), section 68 (c) — *Mortgage—
Construction of document — Power of sale in a usufructuary mortgage*

A mortgage-deed which was primarily usufructuary provided that if the mortgagor failed to deliver possession or if the mortgagee was dispossessed from the mortgaged premises he might recover the amount of the mortgage debt from the mortgagor and the mortgaged property. *Held* that the mortgagee failing to get possession was competent to sue for and obtain a decree for sale of the mortgaged property. *Jafar Husen v. Ranjit Singh* (1) and *Kashi Ram v. Sardar Singh* (2) referred to.

THIS was a suit for sale on a mortgage. The mortgage was primarily a usufructuary mortgage, but contained a provision that if, *inter alia*, the mortgagor did not give possession of the mortgaged property, the mortgagee could recover the mortgage money with interest at Rs. 2 per cent. per mensem from the mortgagor and the mortgaged property. The Court of first instance (First Additional Munsif of Meerut) dismissed the suit, finding that the plaintiff was in possession of the mortgaged property. But on appeal by the plaintiff the Additional District Judge found that the plaintiff was not in possession, and allowing the appeal, gave him a decree for sale. The defendants appealed to the High Court.

Munshi Gulzari Lal, for the appellants.

The Hon'ble Pandit Sun-dar Lal (for whom Pandit Baldeo Ram Dave), for the respondent.

STANLEY, C. J., and BURKITT, J.—We are of opinion that the learned District Judge rightly decided the appeal before him. From a perusal of the mortgage which has given rise to this suit it appears to us that the only reasonable inference to be drawn from it is that the intention of the parties was to provide for the realization of the mortgage debt from the property itself and not merely from its usufruct. The deed in fact was of the nature of a simple mortgage, as well as of a usufructuary mortgage. The case

* Second Appeal No. 4 of 1907 from a decree of Ahmad Ali Khan, Additional Judge of Meerut, dated the 21st of November 1906, reversing a decree of Ram Chandra Chaudhri, Munsif of Meerut, dated the 18th of December 1905.

in fact resembles more that of *Jafar Husen v. Ranjit Singh* (1) than that of *Kashi Ram v. Sardar Singh* (2). In the first mentioned of these cases the Court came to the conclusion that the intention of the parties was that the debt was realizable by sale of the mortgaged property, whereas in the other case, this Bench was of opinion that the mortgage in suit was merely a usufructuary mortgage. For these reasons we dismiss the appeal with costs.

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Appeal dismissed.

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

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TIKAM SINGH AND ANOTHER (DEFENDANTS) v. KHUBI RAM AND ANOTHER (PLAINTIFFS).*

Lambardar and co-sharer—Powers of lambardar to deal with coparcenary lands.—Lease for seven years.

In the absence of a custom to the contrary a lambardar has no power, without the consent of the co-sharers, to grant a lease of coparcenary land beyond such term as the circumstances of the particular year or season may require. *Cratray v. Nawala* (3) followed. *Mukhta Prasad v. Kamta Singh*, (4) distinguished.

THIS was a suit brought by certain co-sharers in the village for a declaration that a lease executed by defendant No. 4, the lambardar, of 160 bighas odd, cultivatory holding, in the village of Edalpur for a term of seven years was void as against them, on the allegation that the lambardar had acted in excess of his powers in granting the lease, and had done so at an inadequate rental in order to injure the plaintiffs. The Court of first instance (Munsif of Havali, Aligarh) decreed the plaintiffs' claim. The lessees appealed. The lower appellate Court (Additional District Judge of Aligarh) found that the rental was inadequate and the term too long, and accordingly dismissed the appeal and confirmed the Munsif's decree. The defendants lessees thereupon appealed to the High Court.

Babu Parbati Churan Chatterji, for the appellants.

* Second appeal No. 151 of 1907 from a decree of Khetter Mohan Ghosh, second Additional Judge of Aligarh, dated the 8th of November 1906, confirming a decree of Banke Behari L.L. Munsif of Havali, dated the 25th of June 1906.

(1) (1898) I. L. R., 21 All., 4. (3) (1906) I. L. T., 29 All., 20.
 (2) (1905) I. L. R., 28 All., 157. (4) Weekly Notes, 1906, p. 277.