1912
April, 10.

APPELLATE CIVIL.

Before Mr. Justice Karamat Husain and Mr. Justice Chamier.

DALIP SINGH AND OTHERS (DEFENDANTS) v. BAHADUR RAM (PLAINTIFF).*

Mortgage—Construction of document—"Muakhiza"—Act No. IV of 1882 *(Transfer of Property Act), sections* 58, 100.

A deed, the basis of a suit for sale as on a mortgage opened with a recital that the executant had borrowed a sum of money, followed by a promise to pay the amount with interest at 2 per cent. per month within a certain time, and then provided: "*muakhiza asl o sud ta yom-ul-wasul upar* (description of the s' are) *haqiyat min muqir....qaim rahega.....lihaza.....batarik tamassuk muakhiza-i-jaidad ka likhdya.*"

Held that this deed could not be construed as a mortgage. The word *muakhiza* did not necessarily imply a power of a sale, and there was nothing else in the deed from which an intention to give a power of sale could be inferred.

THE facts of this case were as follows:—

The plaintiff brought a suit for the recovery of Rs. 563-14-0, due on a bond, dated the 31st of March, 1892, executed by one Moghal Singh in favour of Bahadur Ram. The bond provided for the payment of the money secured by the end of Jeth, 1301 Fasli, corresponding to June, 1894. The defendants denied execution of the bond and said that as the bond did not amount to a mortgage, the suit was beyond time, having been brought more than 12 years after the money became payable. The Munsif held that the bond created only a charge on the property and that the suit was barred by limitation. The District Judge, on appeal, held that the bond created a mortgage, that section 31 of the Limitation Act of 1908 extended the period of limitation for mortgages, as well as charges, and remanded the suit to the first court for decision on its merits. The word used in the bond to connote hypothecation was *muakhiza*.

Maulvi *Muhammad Ishaq*, for the appellants:—

The only question in this appeal is whether the words used in the bond created a simple mortgage as defined in section 58 of the Transfer of Property Act, or whether they only amounted to a charge on the property specified in the deed. The words generally used in mortgage-deeds are *rehan, arh, mustaghraq, makful, kifalat* and the use of the word *muakhiza* which finds a place in section 100 in the authorized Urdu translation of the Transfer of

* First Appeal No. 5 of 1912 from an order of Kanhaya Lal, District Judge of Azamgarh, dated the 18th of September, 1911.

Property Act—to the exclusion of any of those words, shows that the intention of the parties was to create only a charge on the property for the repayment of the loan; *Kishan Lal* v. *Ganga Ram* (1); *Gour's "Law of Transfer,"* pp. 633, 655; *Ghose's Mortgage*, p. 1043; *Moti Ram* v. *Vitai* (2); *Gobinda Chandra Pal* v. *Dwarka Nath Pal* (3); *Janardan Vishnu Kulkarni* v. *Anant Lakshmanshet* (4).

Mr. *M. L. Agarwala*, for the respondents:—

The mere use of the word *muakhiza* in the deed does not necessarily imply that the bond in question was not a mortgage bond. The intention of the parties has to be gathered from the document read as a whole. Charge, as defined in section 100 of the Act, includes every burden on property which does not amount to a mortgage as defined in section 58; and it has to be seen whether the stipulations in the present bond amount to a mortgage. The bond provides that the principal and interest due upon it shall be charged upon immovable property specifically described therein. It is not very easy to draw a sharp line of demarcation between a mortgage and a charge; but the real difference is that the latter is a much wider term than the former. A mortgage involves the transfer of an interest in 'specific immovable property' while a charge does not necessarily, and, while by a charge a title is not transferred and only the repayment of the money is secured out of a particular fund, the property hypothecated remains charged in the other, with the liability to repay that debt; *Royzuddi Sheik* v. *Kali Nath Mookerjee* (5). There is another distinction between the two. A bond creating a charge need not be attested by at least two witnesses, which is absolutely necessary to create a valid mortgage. The deed in question is attested by more than two witnesses. All the elements necessary to constitute a valid simple mortgage exist in the present case, and as the document created an interest in specific immovable property, there can be no doubt that the intention of the parties was to create a simple mortgage, though the deed does not contain any of those ordinary words connoting hypothecation.

(1) (1891) I. L. R., 13 All., 28. (3) (1908) I L. R., 35 Calc., 887.
(2) (1889) I. L. R., 13 Bom., 90. (4) (1908) I. L. R., 32 Bom., 386.
(5) (1906) I. L. R., 3 Calc., 985.

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DALIP SINGH v. BAHADUR RAM.

Maulvi *Muhammad Ishaq*, was heard in reply.

KARAMAT HUSAIN and CHAMIER, JJ. :—This appeal arises out of a suit brought by the respondent for the recovery of Rs. 563 odd by the sale of a share in a village. The suit is based upon a document, dated the 31st of March, 1891, which, according to the respondent, effected a mortgage of the share, but which according to the appellants effected only a charge on the share. If there was a mortgage the suit is maintainable, and the order of the lower appellate court remanding the suit for trial on the merits is correct. If there was only a charge, the suit is barred by limitation, as was held by the court of first instance, and this appeal must be allowed.

The deed opens with a recital that the executant has borrowed Rs. 991; then follows a promise by him to pay that amount with interest at the rate of 2 per cent. per mensem within a certain time, and after that there are the following words :—

Muakhiza asl o sud to yom-ul-wasul upar [description of the share] *haqiyat min muqir .....qaim rahega.....lihaza.....batarik tamassuk muakhiza-i-jaidad ka likhdya.*

If it is a mortgage at all, it is a simple mortgage. In order that there may be a simple mortgage, there must be *(a)* a transfer of an interest in specific immovable property, *(b)* a personal undertaking by the mortgagor to pay the mortgage money, and *(c)* an agreement, express or implied, that in the event of the mortgagor failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold. The second requirement is satisfied. There is no express transfer of an interest in property, and there is no express agreement that in case of default the mortgagee may bring the property to sale. But in a simple mortgage the interest transferred is the right to have the property sold, and this need not necessarily be provided for in the deed in so many words; it may be inferred from the language used and where such an agreement can be inferred, the first and third requirements are satisfied. We are asked to infer such an agreement from the use of the word *muakhiza*. It is conceded that this is not a word commonly employed to denote a simple mortgage. The words commonly used are *rehn*, *kifalat* and *mustaghraq*, and their grammatical variations. The root meaning of *muakhiza* is "taking," and the word is generally used in the sense of taking

satisfaction or calling to account. Thus *muakhizadar* is a man who is responsible or called to account. There is nothing in the word which necessarily implies taking and selling. For what it may be worth we note that the word *muakhiza* is used in the authorized translation of section 100 of the Transfer of Property Act for the word *charge* in the original. The words ordinarily used to denote a mortgage were well known in 1891, when the deed in question was executed. The word *muakhiza* does not necessarily imply a power of sale, and there is nothing else in the deed from which an intention to give a power of sale can be inferred. We are unable to hold that the deed conferred upon the creditor a power to bring the property to sale. In our opinion the deed is not a mortgage. We allow the appeal, set aside the decree of the lower appellate court and restore the decree of the first court. The appellants must pay the respondent's costs in all the three courts.

Appeal decreed.

REVISIONAL CRIMINAL.

1912
April, 11.

Before Mr. Justice Sir George Knox.

EMPEROR v. THAKUR PANDE.*

Criminal Procedure Code, sections 107, 145—*Security to keep the peace—Dispute concerning land likely to lead to a breach of the peace—Procedure.*

Where there exists a dispute relating to immovable property which is likely to lead to a breach of the peace, the magistrate concerned is not necessarily bound to proceed under section 145, but can take action—and this may sometimes be the better course—equally under section 107 of the Code of Criminal Procedure. *Sheoraj Roy* v. *Chatter Roy* (1) and *Emperor* v. *Ram Baran Singh* (2) followed. *Mahadeo Kunwar* v. *Bisu* (3) distinguished. *Balajit Singh* v. *Bhoju Ghose* (4) not followed.

A magistrate of the first class found after taking evidence that there existed between two parties a serious dispute relating to certain immovable property which was likely to give rise to a breach of the peace. He also came to the conclusion that one party was attempting on their own authority to set aside a possession of long standing. The Magistrate, however, did not take action

* Criminal Revision No. 60 of 1912 from an order of Sri Lal, Sessions Judge of Ghazipur, dated the 23rd December, 1911.

(1) (1905) I. L. R., 32 Calc., 966.
(2) (1906) I. L. R., 28 All., 406.
(3) (1903) I. L. R., 25 All., 537.
(4) (1907) I. L. R., 35 Calc., 117.