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If, on the other hand, he has no real interest in the property in suit he should obviously not be permitted to maintain the application under order XXI, rule 90. We therefore accept this appeal; set aside the order of the court below, allowing the application of Salamat-ullah Khan, and direct the record to be returned to that court in order that it may proceed to pass all necessary orders confirming the sale and to dispose of the matter in accordance with law. The appellant will get his costs of this appeal.

Appeal decreed.

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March, 17.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Tudball.

KHURSHED ALI AND OTHERS (PLAINTIFFS) *v.* ABDUL MAJID AND OTHERS (DEFENDANTS).*

Pre-emption—Transfer—Mortgage—Use of the term "makbuza" *not sufficient to constitute a mortgage.*

The material portion of a document executed by the borrowers to secure a loan was as follows:—

"We agree that we shall pay annually the interest and in default of payment of interest for two years, the creditors shall have the right, without waiting for the expiry of the time fixed, to file suit and to recover their due from the property mortgaged (*makbuza*) and if the creditors make delay in realizing the principal and interest then the aforesaid creditors shall not be entitled to recover their dues under the deed from any other property of myself excepting the property mortgaged (*makbuza*)."

A claim for pre-emption was brought based upon this document, which was claimed to be a sale, or at least a mortgage.

Held by RICHARDS, C. J., that it was very difficult to distinguish the transaction evidenced by the document in question from what is ordinarily called a "simple mortgage". On a construction, however, of the wajib-ul-arz it was held not to include mortgages which did not involve a change of possession.

Held by TUDBALL, J., that the document under consideration did not amount to a mortgage, but at most constituted a charge on the property referred to therein. *Dalip Singh* v. *Bahadur Ram* (1), referred to.

THIS was a suit for pre-emption based upon the wajib-ul-arz and upon a document executed by the defendants, the material portion of which was in the following terms:—

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* Second Appeal No. 1759 of 1914, from a decree of Durga Datt Joshi, District Judge of Azamgarh, dated the 26th of October, 1914, reversing a decree of Suraj Narain Majju, Subordinate Judge of Azamgarh, dated the 28th of July, 1914.

(1) (1912) I.L.R., 34 All., 446.

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"We agree that we shall pay annually the interest and in default of payment of interest for two years, the creditors shall have the right, without waiting for the expiry of the time fixed, to file suit and to recover their due from the property mortgaged (*makbuza*) and if the creditors make delay in realizing the principal and interest then the aforesaid creditors shall not be entitled to recover their dues under the deed from any other property of myself excepting the property mortgaged (*makbuza*.)"

The plaintiffs come into court alleging that in reality the transaction was sale and that they were entitled to get possession upon payment of the consideration. They further claimed, however, in the alternative that if the transaction was a mortgage they might be substituted for the mortgagees. The court of first instance held that the transaction was not a sale, but a mortgage, and granted the plaintiffs the alternative relief. The lower appellate court agreeing with the court of first instance that the transaction was not a sale and that the document merely operated as a "charge" on the property, held that there was no right of substitution and accordingly dismissed the suit.

The plaintiffs appealed to the High Court.

The Hon'ble Dr. *Tej Bahadur Sapru* and Maulvi *Iqbal Ahmad*, for the appellants.

Dr. *Surendra Nath Sen*, for the respondents.

RICHARDS, C. J.—This appeal arises out of a suit in which the plaintiffs seek to enforce their claim for pre-emption. The document which gave rise to the alleged cause of action is in the following terms :—

"We agree that we shall pay annually the interest and in default of payment of interest for two years, the creditors shall have the right, without waiting for the expiry of the time fixed, to file suit and to recover their due from the property mortgaged (*makbuza*) and if the creditors make delay in realizing the principal and interest then the aforesaid creditors shall not be entitled to recover their dues under the deed from any other property of myself excepting the property mortgaged (*makbuza*)."

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Section 58 (clause *b*) of the Transfer of Property Act is as follows:—"Where without delivering possession of the mortgaged property the mortgagor binds himself personally to pay the mortgage money and agrees expressly or impliedly that in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage-money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee."

If we omit from the definition the words, "mortgage" and "mortgaged" and substitute for the word "mortgagor" the word "borrower" and the word "lender" for the word "mortgagee," the document in question seems to me to come clearly within the definition of a 'simple mortgage.' The borrowers had bound themselves to pay the money lent and had agreed that in the event of the money not being paid, the lenders should have a right to cause the property made security for the loan to be sold. I have substituted the words "borrowers" and "lenders" for "mortgagors" and "mortgagees" in order to get over the difficulty created by the previous part of section 58, which defines "mortgagor" as "the transferor of an interest" and "mortgagee" as "the transferee of an interest." I do not think the substitution alters the meaning of the clause. I think what are ordinarily treated as "simple mortgages" in these provinces are not strictly "simple mortgages" within the definition of section 58, because I think there is in almost all these documents no "transfer of an interest" in specific immovable property for the purpose of securing the payment of money advanced. If therefore I was satisfied that the present plaintiffs were entitled to be substituted for what is generally called a simple mortgagee, I would hold that

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they were entitled in the present case to be so substituted, because I find the greatest difficulty in distinguishing the transaction which is evidenced by the document in question from what is ordinarily called a "simple mortgage." The mere fact that a somewhat unusual word (*makbuza*) is used, does not make the document either more or less a "simple mortgage" than if the more usual word "maqful" or "mustagaraq" was used.

There remains the question whether or not the plaintiffs have proved the existence of a custom which gives a right to be substituted in the case of what is ordinarily called a simple mortgage. The only evidence adduced in support of the alleged custom is the wajib-ul-arz of 1872. The entry is in the following terms:—"If any co-sharer wishes to make a transfer of any kind, he will first do so to a *hissadar karibi*, next to the *hissadar* of that *thok*, next to the *hissadar* of another *thok*. If none of the co-sharers of the village takes it he may then transfer it to a stranger. If he does not conform to it, then *hissadar karibi*, *hissadar thok*, and *hissadar* of another *thok*, according to the aforesaid order of priority, have the preferential right to take the property by pre-emption. If at the time of the issue of a proclamation or at the time of the expiry of the limitation prescribed in clause 15 of section 1 of Act XIV of 1859, or of any other Act relating to redemption of mortgage (*chorane miad rehan*), the owner of the property be not capable of redeeming, or do not wish to redeem, then *hissadar karibi*, *etc.*, had power to take the property for himself by depositing the mortgage-money together with the costs. If any *hissadar* of *arazi* or *hissa* take any additional sum of money from the creditor to whom the property is mortgaged (*rehan hai*) by making a *maqful* of the same property, then the terms of the mortgage bond will apply to the said debt also."

It seems to me that this record points very much to transactions which involve an actual change of possession. According to the most natural meaning of the earlier part of the clause transactions of this kind seemed to be contemplated. Then the latter part of the record deals, I think, with possessory mortgages and shows that the right intended to be recorded was that

even where co-sharers had not availed themselves of their right when the transfer was originally made, they would still have a right of getting the property at any time before the right of redemption was entirely gone. It was pointed out, and no doubt correctly pointed out, that the word *intiqal* (transfer) is a very general word and includes all classes of transfers, but in my opinion the decision does not depend upon the interpretation to be put upon particular words occurring in the wajib-ul-arz. The extract from the *wajib-ul-arz* is evidence to be taken into consideration in considering the issue as to whether or not the custom exists. The record is supposed to be the record of an old custom existing for a long time, and I think that it will be found that in olden times mortgages without possession (or at least the right to possession) were hardly recognised. In my judgement the mere production of the extract from the wajib-ul-arz was insufficient to prove the existence of the custom which it is necessary for the plaintiffs to prove in order to entitle them to be substituted for the defendants. On these grounds I would dismiss the appeal.

TUDBALL, J.—I agree that the appeal fails, chiefly for the reason that I have considerable doubt that the parties to the document in suit ever intended to create a mortgage at all. Assuming that the custom as alleged by the plaintiff does exist and that the mortgage falls within that custom, the bond in question does not use the ordinary vernacular terms which are used in these provinces when parties wish to create a mortgage and give the mortgagee the right to sell the property. Beyond doubt it is difficult to distinguish between a document which merely creates a charge and a simple mortgage. But there are certain terms which are in common use in these provinces in vernacular documents when the parties wish to create what is commonly known as a simple mortgage. The word *makbuza* which is used in the document has been considered and discussed by a Bench of this Court in *Dalip Singh* v. *Bahadur Ram* (1), and I agree with the conclusion of the learned Judges who constituted that Bench, that in using this word the parties can hardly be said to have contemplated anything more than a charge.

(1) (1912) I.L.R., 34 All., 446.

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It was for this reason that the court below dismissed the suit. I must also add that I have considerable doubt that the custom which the plaintiff has put forward as evidenced by the wajib-ul-arz ever contemplated a case like the present. However, as the appeal in my opinion ought to be dismissed on the other ground, I think it unnecessary to decide this point.

BY THE COURT.—The order of the Court is that the appeal be dismissed with costs.

Appeal dismissed.

FULL BENCH.

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March, 24.

Before Sir Henry Richards, Knight, Chief Justice, Mr. Justice Tudball and Mr. Justice Muhammad Rafiq.

JAGRANI (PLAINTIFF) *v.* BISHESHAR DUBE AND OTHERS (DEFENDANTS.)*

Act No. XVI of 1908 (*Indian Registration Act*), *sections* 17 *and* 49—*Registration—Petition to Revenue Court in mutation proceedings—Compromise—Family settlement.*

A separated Hindu created two usufructuary mortgages on portions of his estate, and then died leaving a widow and a daughter. The widow held possession for her life-time and created a third usufructuary mortgage. She died. Her daughter laid claim to the estate and applied for entry of her name in the revenue records. M, one of the reversioners, contested her application, urging that her father was joint with him and not separate. The parties came to terms, orally. The daughter agreed to give up her claim; M, in return, agreed to take the estate, to pay off the mortgages and to pay a certain sum to the daughter. They two then filed a joint petition in which it was stated that the parties had come to terms. This statement in the petition was followed by another on behalf of the daughter that as she had given up her claim to the estate she had no objection to mutation of names being made in favour of M. The Revenue Court's order was that mutation was to be made according to that compromise. M, to secure to the daughter the payment of the money which he had promised to pay, executed two bonds in favour of her sister's husband; but he never paid the money due thereon; on the countrary he managed to get the bonds back and kept them. Some time afterwards the daughter sued to recover possession of the property in dispute.

Held that in the circumstances the plaintiff was entitled to a decree conditioned on her paying the amount due on the mortgages.

THIS was an appeal under section 10 of the Letters Patent from a judgement of a single Judge of the Court. The

* Appeal No. 4 of 1915 under section 10 of the Letters Patent.