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of the attesting witnesses was in the handwriting of that witness, and the further proof that the signature which purported to be that of the mortgagor was the signature of the mortgagor. The Court held that the mortgage, in the absence of any other rebutting evidence, was sufficiently proved. We think that the principle laid down in that case applies to the present case and we ought to follow it. In the connected appeal the lower appellate court has disallowed portion of the interest on the ground of undue influence. The learned Judge has pointed out that at the date of the mortgage the mortgagor was already indebted to the mortgagee. He speaks of the inability of the mortgagor to satisfy those debts and the necessity to incorporate the debts into a mortgage and he therefore says that undue influence must be presumed. We must point out that the defence to the present suit was not undue influence either in respect of the principal or interest. No evidence was given on the point. So far as we know to the contrary the debtor may have been able to pay his debts, and it does not necessarily follow that he was obliged to make a mortgage, or that he was even asked to make a mortgage. Furthermore, bearing in mind the rates of interest which are common in these provinces, Rs. 12 per cent. per annum with yearly rests was not an exceptionally high rate. We think that the circumstances of the present case were not sufficient to justify the lower appellate court in disallowing any portion of the interest. We dismiss the appeal with costs.

Appeal dismissed.

FULL BENCH.

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December, 11.

Before Mr. Justice Tudball, Mr. Justice Muhammad Rafiq and Mr. Justice Piggott.

MOHAN LAL AND OTHERS (PLAINTIFFS) *v.* INDOMATI AND OTHERS (DEFENDANTS.)*

Act No. IV of 1882 *(Transfer of Property Act), section* 58—*Mortgage—Construction of document.*

A bond was executed in the following terms:—"I have borrowed Rs. 1,000 from so and so . . . and ¼ out of the entire 20 biswa zamindari property in . . belonging to me, and have brought the same to my use. I therefore

* Appeal No. 23 of 1914, under section 10 of the Letters Patent.

convenant and give it in writing that I shall repay the aforesaid amount with interest, etc. Until the repayment of the aforesaid amount I shall not transfer the aforesaid property . . . If I do so, then such transfer shall be invalid. I have, therefore, executed these few presents by way of a bond (*tamassuk*) . . . "

Held, that the document did not constitute a simple mortgage, as there was no transfer of a specific interest in immovable property to the lender nor any power of sale conferred on him. *Dalip Singh* v. *Bahadur Ram* (1) referred to by PIGGOTT J.

THIS appeal arose out of a suit for sale brought upon the basis of what the plaintiffs claimed to be a deed of simple mortgage, dated the 12th of May, 1884. The document set out that the executant had borrowed Rs. 1,000; mentioned the details of a certain property and his share therein; named and described the creditors; then there was a promise to repay the money with interest at a specified rate within seven months, and, finally, there was a clause that until repayment of the money the executant undertook not to alienate the above mentioned property by way of sale, mortgage, gift, security or otherwise; any such alienation, if made, was to be deemed void. The document was described at the end as a "*tamassuk*". The words in the vernacular were as follows:—" . . . *jo mubligh ek hazar rupiya sikka chalan Shahi, ki adhe uske panch sau rupaye hote hain; bist biswa haqiyat zamindari waqae mauza Kankauli pargana Bhojpur ke us men se ek suls haqiyat zamindari waqae mauza Kankauli, pargana Bhojpur milkiyat apne ke pas Lala Baldeo Das wald . . . se karaz lekar ta-tahat apne ke laya; is waste iqrar karta hun . . . ki rupiya mazkur mai sood bahisab . . . ada karunga, kuchh uzr nahin karunga; aur ta adai is rupiya ke jaidad mazkura bala ko az rui bai wa rehan wa hiba wa zamin waghaira kisi tarah kahin par muntaqil nah karunga, agar karun to najaiz howe; is waste yih chand kalma batariq tamassuk tadadi hazar rupiya ka likh diya ki sanad rahe aur waqt hajat ke kam awe.*"

The suit was instituted on the 6th of August, 1910. The court of first instance held that the transaction did not amount to a mortgage but at the most created only a charge, and so the plaintiffs were not entitled to the benefit of the extended period of limitation conferred by section 31 of the Limitation Act. The suit

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

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was dismissed as time-barred. The plaintiffs appealed to the High Court, and the appeal was heard by a Bench of two Judges who differed in opinion. [*Vide.* 12 A. L. J., 290.]

The plaintiffs then appealed under section 10 of the Letters Patent.

Munshi *Gulzari Lal*, (with him Babu *Lalit Mohan Banerji* and Munshi *Girdhari Lal Agarwala*), for the appellants:—

The document was intended to create and did create a simple mortgage. Reading the document it is obvious that it was drawn up carelessly and unskilfully, by a not very literate person. The sentence which gives the description of the property is incomplete; it contains no verb; apparently the words "*rahan kiya*" or "*mustaghraq kiya*" were inadvertently omitted. The mention of specific immovable property in connection with the loan and the convenant not to alienate it until repayment of the debt show beyond doubt that it was intended to create a simple mortgage and that the parties understood the transaction as being a simple mortgage. Even as it stands, the document fulfils the requirements of a simple mortgage as defined by section 58 of the Transfer of Property Act. No precise form or express words like "*rehan*" or "*mustaghraq*" are prescribed or indispensable. The agreement that the mortgagee shall have a right to cause the property to be sold need not, the section says, be *express* but may be *implied*. An express authorization to sell is rather the exception than the rule in these provinces. The covenant not to alienate the specified property till repayment of the loan and the declaration that such alienation, if made, would be void, imply an agreement that the mortgagee shall have a right to cause the property to be sold, although it is not expressed in that form. The covenant would, otherwise, be meaningless and without purpose. It is not the literal sense but the real meaning which the transaction discloses is to be looked at; *Martin* v. *Pursram* (1), *Rajkumar Ramgopal Narayn Singh* v. *Ram Datt Chowdhury* (2), *Sri Raja Papamma Rao* v. *Sri Vira Pratapa H. V. Ramachandra Razu* (3), and *Sheoratan Kuar* v. *Mahipal Kuar* (4). When the mortgagor agrees expressly or, as in the present case, impliedly, that the mortgagee shall have the

(1) N.-W. P., H. C. Rep., 1867, p. 124.
(2) (1870) 5 B. L. R., 264.
(3) (1896) I. L. R., 19 Mad., 249.
(4) (1884) I. L. R., 7 All., 258.

right to get the property sold in satisfaction of the debt there is a sufficient transfer of an interest, namely, the right to sell, in the property. No other or more specific "transfer of an interest" in the property is necessary in the case of a simple mortgage. This is borne out by the cases already cited and by the observations of the Chief Justice in the case of *Khurshed Ali* v. *Abdul Majid* (1). In fact section 58, clause (*b*), of the Transfer of Property Act which defines a simple mortgage does not speak of any such transfer. As regards the view that the document creates only a charge and not a mortgage, it is difficult to lay down a hard and fast line of demarcation between the two in cases where property is made security for the repayment of a loan. The definition of "charge," as contained in section 100 of the Transfer of Property Act, furnishes no criterion. Each case must be decided with reference to the terms and expressions used and the intention of the parties which can be gathered from those terms and expressions. There are some general observations on this point in the case of *Gobinda Chandra Pal* v. *Dwarka Nath Pal* (2). If there are words sufficient to create a charge the Legislature gives the charge-holder the right to cause the property to be sold; so that where there is a promise to repay a loan and specific immovable property is charged therefor and the document is executed in the manner provided by section 59 of the Transfer of Property Act, the transaction amounts to an ordinary simple mortgage; the element of transfer of the right to cause the property to be sold being imported into the transaction by operation of law. If the document in question created a charge it follows that it also amounted to a simple mortgage.

The document was stamped as a mortagage and registered as a mortgage in Register No. 1. It was filed as a mortgage-deed in a former litigation. It was all along treated as a mortgage.

The Hon'ble Dr. *Tej Bahadur Sapru*, (with him Dr. *Surendra Nath Sen*), for the respondents:—

The sole question in this case is that of the interpretation of the terms of the document itself; other cases are not of much help, unless they have laid down principles of universal application. Looking at the terms of the document, the appellants say that

(1) (1916) I. L. R., 38 All., 361. (2) (1908) I. L. R., 35 Calc., 837 (843).

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the word "*rehan*" or "*maqful*" must have been inadvertently omitted. In the first place, even the putting in of such a word would not make the sentence or the sense complete. Secondly, there is no warrant for the assumption that the word, if any, inadvertently omitted was "*rehan*" or mortgage and not "*muakhiza*" or charge. I do not say that the document created either a mortgage or a charge; but nothing short of the transaction being held a mortgage is of any help to the appellants; if it be held to be a charge the benefit of section 31 of the Limitation Act is not available; *Bhagwati Singh* v. *Sarup Singh* (1). The appellant's main reliance is upon the clause by which the executant undertakes not to alienate the property until repayment of the loan and declares that any such alienation would be void. But what is the legal effect of this clause? The creditor derives no enforceable rights under it; he cannot prevent an alienation by an injunction, and an alienation, if made, is not void. *Bhupal* v. *Jag Ram* (2). A mere convenant not to alienate does not confer any rights on the creditor and does not transfer to him any interest in the property. It does not vest in him the right to have the property sold. A promise by the debtor that he will not sell or otherwise transfer a certain property does not *ipso facto* imply that the creditor will have the right to sell it. There is nothing in the document from which an intention to give a power of sale can be inferred. There are no words indicative of a hypothecation, mortgage or charge and there is nothing upon which it can be argued that there was any actual transfer of an interest in property, which is the initial element in the creation of a mortgage, simple or otherwise. Documents in which a similar clause against alienation existed were held, in the following cases, not to have created a mortgage: *Najibulla Mulla* v. *Nusir Mistri* (3), *Royzuddi Sheikh* v. *Kali Nath Mookerjee* (4), *Bhupal* v. *Jag Ram* (2) and *Gunoo Singh* v. *Latafut Hoosain* (5). In the case of *Nabin Chand Naskar* v. *Raj Coomar Sarkar* (6), there was a similar clause; and, in addition, express words indicative of hypothecation and of the creditor's right to sell the property; and yet MACLEAN, C. J., expressed great doubts about the transaction amounting to a mortgage.

(1) (1912) 15 Indian Cases, 851.
(2) (1879) I. L. R., 2 All., 449.
(3) (1881) I. L. R., 7 Calc., 196.
(4) (1906) I. L. R., 33 Calc., 985 (992).
(5) (1877) I. L. R., 3 Calc., 336.
(6) (1905) 9 C. W. N., 1001.

The document is described at the end as a "*tamassuk;*" this word is usually employed to denote simple money bonds; *Ram Prashad Rai* v. *Nawab Chowdhury* (1) As to the distinction between a mortgage and a charge reference may be made to the case of *Burlinson* v. *Hall* (2), *Dalip Singh* v. *Bahadur Ram,* (3) *Gobinda Chandra Pal* v. *Dwarka Nath Pal* (4), where it was held that if an instrument is not on the face of it a mortgage, but simply creates a lien or directs realization from a particular property, without reference to sale, it creates only a charge. In the cases in I. L. R., 19 Mad., 249 and I. L. R., 7 All., 258, cited by the appellants the document contained express words of mortgage. In the case in I. L. R., 38 All., 361, TUDBALL, J., held that the transaction was a mere charge.

Munshi *Gulzari Lal*, in reply.—

In the cases in I. L. R., 3 Calc., 336, I. L. R., 2 All., 449 and I. L. R., 7 Calc., 196, cited by the respondents, the document did not mention any *specific* immovable property; there was only a general reference to "all the property" of the executant. The presence or absence of a particular word, such as "*rehan*" or "*muakhiza*" or "*tamassuk*" is not decisive. The general import and intention of the document as a whole are to be looked at.

TUDBALL, J.—This is a Letters Patent appeal, preferred by the plaintiffs, arising out of a suit for sale brought upon the basis of a document, dated the 12th of May, 1884, executed by Chaudhri Raj Kumar, which the plaintiffs put forward as a deed of simple mortgage. The learned Judges who constituted the Bench before whom the appeal came, have differed in opinion, hence the present appeal. The question which we have to decide is whether or not the deed of the 12th of May, 1884, constitutes a deed of simple mortgage. If it does, then the suit, having been brought within the period allowed by section 31 of the Limitaion Act, is within time, and the case will have to go back to the court below for trial on the merits. If, however, it does not, the suit must fail and this appeal must also be dismissed. On the date in question Chaudhri Raj Kumar borrowed Rs. 1,000 from Baldeo Das and Sheo Dat Rai, and executed the document

(1) (1912) 16 Indian Cases, 222.
(2) (1884) 12 Q. B. D., 347.
(3) (1912) I. L. R., 34 All., 446.
(4) (1908) I. L. R., 35 Calc., 837 (844).

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in suit. The suit is to recover the amount due including interest. The total amount due was something over Rs. 7,000. The claim is laid at Rs. 6,000. The decision of the case in my opinion, depends simply upon the meaning that can be attached to the language of the deed. The document (taking the essential portions) runs as follows:—"I have borrowed Rs. 1,000, from so and so" . . . "and $\frac{1}{3}$rd out of the entire 20 biswas zamindari property in mauza Kankauli, pargana Bhojpur, belonging to me, and have brought the same to my use. I therefore covenant and give it in writing that I shall repay the aforesaid amount with interest, etc. Until the repayment of the aforesaid amount I shall not transfer the aforesaid property either by sale, mortgage, gift, security or any other way; if I shall do so, then such transfer shall be invalid. I have therefore executed these few presents by way of a bond (*tamassuk*) for Rs. 1,000 so that it may serve as evidence and be of use when needed." The court below dismissed the claim, holding that the above document was not a deed of mortgage. On behalf of the plaintiffs it is urged before us that there has clearly been some omission in the fairing out of the document and that the words "*rehan kiya*" or "*maqful kiya*" ought to have been there, that the intention to create a mortgage, is shown by the fact that the executant relates in the body of the document that he will not transfer the property mentioned therein until the debt has been repaid; and that if such transfer is made, it should be deemed invalid. A large number of cases have been quoted to us, but it seems to me that the decision of the case depends simply upon the meaning which is to be attached to the document, the intention of the parties being derived from the language that they have used in expressing it. In the case of a simple mortgage there is a transfer of an interest in specific property and a promise by the mortgagor to pay the mortgage money, and an agreement, express or implied, that if the money be not paid according to the contract, the mortgagee shall have a right to have the mortgaged property sold. In the document, as it stands, I personally am unable to find the transfer of any interest whatever to the money-lender, nor does the language disclose to me that the executant of the deed gave to his creditor a right to put the property to

sale. It is impossible to read into the document the words which we have been asked to read into it, as it is also impossible to read into it other words which have been held in more cases than one in this Court, not to denote a mortgage but merely a charge. The mere fact that the executant of the document agreed not to transfer the property until he had repaid the debt, does not constitute the deed a mortgage, nor does it necessarily indicate that a mortgage and *only a mortgage* was intended; nor does it give a right to put the property to sale. If anything, it is merely a restriction of the executant's right to sell his property: that is not the same as giving the creditor a right to put the property to sale. In the case of a simple mortgage, such language is quite unnecessary. The mortgagee can always have the property sold no matter into whose hand it may go. Lastly, there is the fact that the executant to this document himself describes it not as a mortgagee-deed but as "*tamassuk*," a word commonly used in this province, to denote a simple money bond. In my opinion this document by no means can be held to constitute a mortgage, and it is very doubtful also whether it can be said to create a charge on the property; but even if it could be said to do the latter, the present suit admittedly would be barred by time and would fail.

For these reasons I would dismiss the appeal, holding that no mortgage has been created.

MUHAMMAD RAFIQ, J.—I am also of opinion that the deed of the 12th of May, 1884, does not create a mortgage in respect of the property mentioned in it. It purports to have been executed by one Chaudhri Raj Kumar in favour of Baldeo Das and Sheo Dat Rai in lieu of Rs. 1,000. The language of the deed is involved and at one place is not quite intelligible. After the usual recital of the names and parentage of the borrower and the lenders and the amount of the loan, the deed refers to certain property without saying anything as to whether the property is to be security for the loan. It then mentions convenants as to repayment and rate of interest for and after the period for which the loan is taken and an undertaking by the borrower not to alienate the property by sale, mortgage, gift, or in any other way till repayment of the loan. It is admitted, and indeed it is clear from its

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language that the document does not in express terms create a mortgage on the property of the executant.

The argument for the obligees is, however, two-fold. It is contended on their behalf that there is an omission, by an oversight of the scribe probably, of the word 'hypothecate,' or 'mortgage,' where the property of the executant is referred to. If such an assumption is not made, the sentence which refers to the property is both ungrammatical and meaningless. And, secondly, the undertaking by the borrower not to transfer the property until repayment of the loan nessarily implies the grant to the creditors of the right and authority to sell the property in case of default by him, for realizing the amount due. Such a grant amounts to a transfer by the borrower of an interest in his property to the creditors and thus creates a simple mortgage as defined in clause (*b*) of section 58 of Act IV of 1882.

It may be conceded that there is some omission probably of the scribe by an oversight in the passage that refers to the property of the executant, for in its present form the passage is both ungrammatical and meaningless. But there is no warrant for the assumption that the word 'hypothecate' or 'mortgage' was intended to be mentioned and has been omitted. The word intended to have been used may have been 'charge' and if the borrower intended to create a charge only over the property the present claim would be out of time. The only assumption that would help the obligees would be the omission of the word 'hypothecate' or 'mortgage' and there is no reason to make such an assumption. The contention that the covenant against alienation until repayment of the loan read with the incomplete passage referring to the property necessarily implies the creation of a mortgage has also no force. A mortgage, as defined in section 58 of Act IV of 1882, involves a transfer of an interest in specific immovable property. An undertaking by a borrower not to alienate his property until the loan is repaid imposes a restriction on his power of disposal of the property which may or may not be binding, but does not transfer an interest in the property to the creditor. I do not think that such an undertaking grants to the creditor the right to sell the property in case of default. The deed in question read as a whole does not expressly or impliedly

create a mortgage over the property mentioned therein. In fact a plausible argument may be based on the use of the word '*tamassuk*' (bond) which occurs in the closing sentence of the deed. It may be said that the word, '*tamassuk*,' negatives the construction of the document as a mortgage-deed. I would therefore dismiss the appeal.

PIGGOTT, J.—I am also of the same opinion. With regard to the definition of mortgage generally, and of the different classes of mortgages, contained in section 58 of the Transfer of Property Act, (No. IV of 1882), I have heard it contended before that the section in question is unhappily worded, and that it might be possible to prove a document to be a simple mortgage without proving it to be a mortgage at all. On this point it is worth while to note that the definition of a simple mortgage in clause (*b*) of the said section makes use of the words "mortgagor," "mortgagee," and "mortgage money;" which have just been defined in clause (*a*) of the same section. It must be taken therefore that, in the definition of the expression "simple mortgage," these words are used in the sense assigned to them in the preceding clause. It follows that a document must be shown, first of all, to be a mortgage, that is to say, the transfer of an interest in specified immovable property, before any question can arise as to its being a simple mortgage. On the general question it seems to me that the law has been very clearly laid down by the learned Judges of this Court who decided the case of *Dalip Singh* v. *Bahadur Ram* (1). In a simple mortgage the interest transfered is the right to have the property sold, and whether or not there has a been transfer of this interest is to be inferred from the language used in the document. In the present case we are asked to infer from the covenant against alienation that there has been such a transfer. A covenant against alienation may be said to be a covenant divesting the executant of a document of a portion of his interest in the property in question, but it does not vest that interest in anyone else. From a more general point of view, it may be said that a covenant against alienation does no more than offer an assurance to the person advancing the money that there will be property available for the realization of a simple money

(1) (1907) I. L. R., 34 All., 446, (448).

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decree, in the event of his being driven to obtain one. Something more than this is required before it can fairly be said that the executant of the document, either expressly or impliedly, conferred on the mortgagee a right to cause this particular property to be sold. I would therefore also agree in dismissing the appeal.

BY THE COURT :—The appeal is dismissed with costs.

Appeal dismissed.

REVISIONAL CIVIL.

Before Mr. Justice Piggott and Mr. Justice Walsh.

1916

December, 11.

DHANDEI KUNWAR (PLAINTIFF) *v.* CHOTU LAL (DEFENDANT)*

Civil Procedure Code (1908), *section* 115—*Act* (*Local*) *No. II of* 1901 (*Agra Tenancy Act*), *section* 202—*Suit relating to an agricultural holding—Order adjourning suit indefinitely—Revision—Powers of High Court—Statute* 5 *and* 6 *Geo.* v. *Cap. LXI, section* 107.

Plaintiff brought a suit in a civil court alleging that the defendant's father had been a lessee of certain property for 7 years ; that after the expiry of the lease he became manager of the property, and after his death the defendant also became manager. He pleaded that the defendant had been dismissed from his position as manager, and asked for possession of the property, which comprised shares in 26 villages, a market and some collection houses. The defendant pleaded that he was a "thekadar" within the meaning of the Tenancy Act, and filed an application praying the court to exercise its jurisdiction under section 202 of that Act. The court acceded to this prayer and adjourned the suit to an indefinite period till the question was decided by the Revenue Court. The plaintiff applied in revision against the order.

Held, (*Per* PIGGOTT, J.) that the revision was incompetent as it was directed against an interlocutory order and a remedy by way of appeal was open to the plaintiff wherein all matters could be decided; (*Per* WALSH, J.) that a revision lay to the High Court.

THE property in suit was an estate comprising 26 villages, including agricultural land, a market and some collection houses. The plaintiff alleged that a lease of this property for seven years had at one time been granted by her deceased husband to the defendant's father; that after the expiry of the lease the defendant's father was appointed manager of the property ; that the defendant, after the death of his father, was appointed manager and remained as such for some time ; and that the defendant had now

* Civil Revision No. 72 of 1916.