

Their Lordships have not found it necessary to deal with a question of limitation which was discussed at considerable length in the High Court, and the finding upon which has been contested by the appellants' counsel before the Board. The question is one of considerable complexity, and they think it undesirable to make any pronouncement upon it in an *ex parte* appeal.

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For the reasons given their Lordships think that the appeal should be allowed; that the decree of the High Court should be set aside, and that of the trial Judge, dated the 13th November, 1923, restored. They will humbly advise His Majesty accordingly. The respondents 1 to 8 must pay the costs of the appellants both in the High Court and before this Board.

Solicitors for appellants: *Douglas Grant and Dold.*

FULL BENCH.

*Before Sir Shah Muhammad Sulaiman, Acting Chief Justice,
Mr. Justice Mukerji and Mr. Justice Boys.*

MUHAMMAD ISHAQ KHAN AND ANOTHER (PLAINTIFFS)
v. RUP NARAIN SINGH AND OTHERS (DEFENDANTS).*

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*Transfer of Property Act (IV of 1882), sections 76(h) and 77
—Mortgage with possession—Fixed rate of interest—
Calculated amount of usufruct mentioned in deed, with-
out any provision about future increase or decrease—
Liability to account—Law prior to Transfer of Property
Act.*

Under section 76(h) of the Transfer of Property Act the liability of a mortgagee in possession to render accounts and give credit to the mortgagor for all receipts after deduction of expenses is absolute, and the mortgagee cannot contract himself out of it, unless he can bring himself strictly within the exception provided by section 77. Where the parties expressly agree that the entire income, whatever it may be,

*Second Appeal No. 50 of 1929, from a decree of Krishna Das, Subordinate Judge of Ghazipur, dated the 21st of August, 1928, modifying a decree of Ejaz Husain, Munsif of Ballia, dated the 29th of February, 1928.

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should be set off against the whole of the interest on the amount advanced, there is no necessity for the mortgagee to keep any account. But where the parties agree upon a fixed rate of interest, there is a liability on the mortgagee to render proper accounts and give credit for all the receipts, after deduction of expenses, towards payment of the stipulated interest and the principal.

On general principles of equity the same rule regarding the mortgagee's liability to render accounts is applicable to the case of mortgages executed before the enactment of the Transfer of Property Act.

A mortgage by conditional sale was executed in 1887, interest at a certain fixed rate was agreed upon, which came to Rs. 75 per annum. The net income of the mortgaged property was stated to be Rs. 68 per annum and the mortgagor undertook to pay Rs. 7 per annum, to make up the deficiency in the amount of interest. The contingency that there might be in the future an increase or decrease in the income did not occur to the parties and was not provided for in the deed. There was no express covenant for or against the liability of the mortgagee to maintain accounts or to account for any surplus income. *Held* that the mortgagee was liable to render accounts and give credit for the surplus income, if any.

This case was first heard by a Division Bench consisting of MUKERJI and ALLEN, JJ., who referred it to a larger Bench. The following is an extract from the referring order:—

The argument on behalf of the appellants is that, except in cases covered by section 77 of the Transfer of Property Act, a mortgagee in possession is bound to render an account and if he really acquires from the property a larger amount than was contemplated by the mortgagor at the date of the execution of the mortgage, the mortgagee cannot keep the surplus to himself on the ground that the mortgagor and he had agreed that the income from the property would be a fixed amount. It is pointed out that section 77 contemplates the cases where the whole of the interest is to be covered by the usufruct or where the usufruct covers the whole of interest and a defined portion of the principal amount.

Section 77 does not contemplate a case in which, by agree-
ment, the usufruct of the mortgaged property is to be taken
in lieu of part only of the entire interest due to the mort-
gagee.

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On the other hand, section 76 of the Transfer of Property Act lays down the liabilities of the mortgagee in possession. In the case of clauses (c) and (d) of this section, the expression "in the absence of a contract to the contrary" appears. Thus, where those clauses apply, it is open to the parties to contract themselves out of those rules, and in that case the mortgagee will not be bound to act in the way he would be bound in the absence of a contract to the contrary. In the clauses (a), (b), (e), (f), (g), (h) and (i) the words, "in the absence of a contract to the contrary" do not appear and therefore the liability of the mortgagee would appear to be absolute and he is not entitled to contract out of those liabilities. For example, in the case of clause (a) which lays down that a mortgagee must manage the property as a person of ordinary prudence would manage it if it were his own, a mortgagee cannot be permitted to agree with the mortgagor that he would manage the property in any way and as carelessly as he chose and that he would not account for the income of the property or would not be liable for any loss occasioned to the property of the mortgagor by the mortgagee's mismanagement. There can be no doubt that in the case of clause (a) the liability of the mortgagee is absolute and he cannot contract himself out of it. Similarly, in the case of clause (g) the mortgagee is required to keep clear, full and accurate accounts. This seems to be an absolute liability and the mortgagee cannot agree validly with the mortgagor that any account that he keeps, however slipshod it may be, will have to be accepted by the mortgagor. Similarly in the case of clause (h) the mortgagee is required to apply the receipts from the mortgaged property, after deducting the expenses and interest thereon, in a certain way. If his income from the property is large, it is contended on behalf of the appellants that it is not open to the mortgagee to agree with the mortgagor that he would keep anything over and above the interest due to him for his own benefit and would not account for the same to the mortgagor.

The argument adduced on behalf of the appellants seems to have great force. The omission from section 77 of the case in which only a part of the interest is to be paid

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out of the usufruct must have been intentional and not accidental. One can see the reason for it without much difficulty. Where the parties agree on a stipulated amount of interest to be paid by one party and to be received by the other, it is that amount alone to which the mortgagee is entitled and he is entitled to nothing more. The exception is where no interest is stipulated for specifically, and it is agreed that whatever be the interest and whatever be the usufruct, one will be set off against the other. There need be no accounting in such a case. But where such is not the case, there must be an accounting.

This view, which has been strongly urged on behalf of the appellants and which, as at present advised, seems to us to be the correct view, was not accepted in the case of *Shafi-un-nisa v. Fazal Rab* (1) by two learned Judges of this Court. That case was similar to the present one. KARAMAT HUSAIN, J., remarked that a usufructuary mortgagee would be liable to render account only by an express stipulation to that effect. He further held that the case before him was covered by section 77 of the Transfer of Property Act, though the facts did not fall within the four corners of that section. His learned colleague, KNOX, J., contented himself with the remark that on the stipulation contained in the deed of mortgage, he agreed with his brother KARAMAT HUSAIN, J.

This case of *Shafi-un-nisa v. Fazal Rab* was cited in a more recent case in this Court, namely *Bihari Lal v. Shib Lal* (2), but it was neither approved nor disapproved. In the Patna High Court the case of *Shafi-un-nisa v. Fazal Rab* was cited in the case of *Kishun Lal v. Hira Lal* (3) and the decision on the point of law was dissented from. The judgment, however, contains a *dictum* to the effect that the judgment in the Allahabad case was correct, if it was to be based merely on the interpretation of the document. No doubt this *dictum* was *obiter*, but it shows, at any rate, that the learned Judges thought that it was open to the mortgagees to contract themselves out of the liabilities laid down by the law under section 76(h) of the Transfer of Property Act. This view is controverted before us by Mr. Iqbal Ahmad, who has argued the case for the appellants.

Mr. Kamla Kant Verma has drawn our attention on behalf of the respondents to another case decided by the

(1) (1910) 7 A.L.J., 787.

(2) (1924) I.L.R., 46 All., 633.

(3) A.I.R., 1929 Pat., 571.

Patna High Court, namely *Raghubar Narain v. Mohit Narayan Jha* (1) which quotes without disapproval the opinion of KARAMAT HUSAIN, J., in the case of *Shafi-un-nisa v. Fazal Rab* (2), viz., that in the absence of a contract to that effect a mortgagee with possession is not bound to account for the usufruct of the property. If that is the view which the learned Judges took in the case of *Raghubar Narain v. Mohit Narayan Jha*, there is a conflict of views among the Judges of the Patna High Court.

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We are of opinion that the case of *Shafi-un-nisa v. Fazal Rab* (2) requires reconsideration, and for this purpose we refer this case to a larger Bench. The points that have to be decided by the Full Bench, such as may be constituted by the learned Chief Justice, will be as follows:—(1) Whether it is open to a mortgagee who has agreed to accept the whole of the usufruct of the mortgaged property in lieu of a portion of the interest due to him, to escape the operation of section 76(h) of the Transfer of Property Act and a rendition of account of the income of the property by an agreement to that effect with the mortgagor: (2) Whether, on a true construction of section 77 of the Transfer of Property Act, a case where the whole of the usufruct of the mortgaged property is taken in lieu of a part of the interest due on the mortgage money is covered by it.

Mr. *Iqbal Ahmad*, for appellants.

Mr. *K. Verma*, for respondents.

SULAIMAN, A. C. J., MUKERJI and BOYS, JJ. :—

'This is a plaintiffs' appeal arising out of a suit for redemption of a mortgage of the 17th of June, 1867, by way of conditional sale, for a sum of Rs. 1,333-5-4. The mortgagor promised to pay interest at the rate of 0-7-6 per mensem which came to Rs. 75 per annum. These figures were expressly recited in the deed. It was further stated that the gross produce of the property was Rs. 187, out of which Rs. 108 had to be paid on account of Government revenue and cesses, Rs. 6-3-6 on account of certain other charges and Rs. 4-8-0 on account of expenses; in all Rs. 119-2-6. The mortgagee was to utilise the balance of Rs. 68 in lieu of interest, and the mortgagor promised to pay Rs. 7 from his pocket on

(1) (1927) I.L.R., 7 Pat., 44.

(2) (1910) 7 A.L.J., 787.

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account of deficiency in the interest. It was contemplated that the mortgage would be redeemed in about nine years' time, and there was the condition for foreclosure that if the mortgagor failed to pay the amount at the stipulated time, the mortgage would be foreclosed. It did not provide what was to happen if there was an increase or decrease in the income, nor did it expressly lay down any covenant as to the liability or otherwise of the mortgagee to maintain accounts or to render them at the time of redemption. The deed was silent as to these matters.

It is an admitted fact that about 1291 Fasli there was a fresh settlement, and the income of the property was considerably increased. It is also an admitted fact that the mortgagors were paying Rs. 7 a year up to that year and then stopped paying any further. It is not disputed that the mortgagee did not insist on the payment of this extra amount, and on account of the default did not consider it necessary to sue for foreclosure.

The plaintiffs claimed that the mortgagee's representatives must give credit for the extra income which accrued after the mortgage; while the mortgagee's representatives disputed this and pleaded that the mortgagor's representatives were bound to make good the balance of Rs. 7 a year. The lower appellate court passed a decree for redemption in favour of the plaintiffs on payment of the principal sum plus Rs. 7 a year from the time when they stopped payment. The plaintiffs appealed to the High Court, and the Division Bench has referred two questions to a Full Bench for answers.

The Division Bench interpreted the mortgage deed in dispute as containing no contract as to what was to happen if there was an increase or decrease in the income. The learned Judges thought that the contingency that there might be an increase or decrease in the income never occurred to the parties and they never

thought about it, so they did not provide for this contingency, that is to say, it was purely a case of omission, and there was no contract against the liability of the mortgagee to account for any surplus income. We must accept this interpretation, as the question of interpretation has not been referred to us.

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The mortgage deed in question was executed before the coming into force of the Transfer of Property Act, and at the time of its execution the parties were bound by the equitable principles governing mortgages and not by the strict language of any section of this enactment. Where the parties expressly agree that the entire income, whatever it be, should be set off against the whole of the interest on the amount advanced, there is, of course, no necessity for the mortgagee to keep any account. On the other hand, where the intention is that the mortgagee should get the interest at an agreed rate, the primary consideration is the payment of the mortgage money with interest at that rate to the mortgagee, even though the income may fluctuate from year to year. It would follow on general equitable principles that where there is a fixed rate of interest there should be a liability on the mortgagee to maintain proper and regular accounts and give credit for all the receipts, and claim compensation for deficit or pay for the surplus. The liability of the mortgagee to render accounts was well recognized even before the coming into force of the Transfer of Property Act. Under section 76 of the Act the liability of the mortgagee in possession to give credit for the receipts, after deducting the expenses and interest, in the account is absolute. It is significant that although the words "in the absence of a contract to the contrary" occur in clauses (c) and (d), those words do not occur in the other clauses, particularly in clause (h) which requires that the receipts from the mortgaged property shall be debited against the mortgagee in reduction of the amount due to him and the surplus, if any, shall be paid to the mortgagee. It is therefore

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quite obvious that unless the case comes within the purview of section 77 of the Act, which in express language excludes the operation of section 76(h), the liability of the mortgagee to give credit for the receipts in the account is absolute and the parties would not be at liberty to contract themselves out of the statutory liability.

Section 77, however, cannot apply unless there is a contract between the mortgagee and the mortgagor that the receipts from the mortgaged property shall, so long as the mortgagee is in possession of the property, be taken in lieu of interest on the principal money or in lieu of such interest and a defined portion of the principal. On the interpretation of the mortgage deed made by the Division Bench there was no such contract in the case before us. Section 77, therefore, has no application and the mortgagee does not come within the purview of the exception. He was, therefore, liable under section 76(h) to render account and give credit for the surplus income, if any.

In this view of the matter it is not necessary to answer the second question.

Our answer to the first question is that where the mortgage is governed by the Transfer of Property Act the mortgagee cannot contract himself out of the provisions of section 76(h) of the Act unless he can bring himself strictly within the exception provided by section 77.

REVISIONAL CRIMINAL

Before Mr. Justice King.

EMPEROR v. LACHMI NARAIN.*

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Criminal Procedure Code, section 252—Warrant case—Right of accused to cross-examine prosecution witnesses before the framing of charge—Discretion of court.

The accused is not entitled, as a matter of right, to cross-examine prosecution witnesses in the trial of a warrant

*Criminal Revision No. 267 of 1931, from an order of F. C. Plowden, Sessions Judge of Bareilly, dated the 15th of April, 1931.