

## APPELLATE CIVIL

*Before Sir Shah Muhammad Sulaiman, Chief Justice, and  
Mr. Justice Bennet*

1937  
February, 26

TIKAM SINGH (PLAINTIFF) v. BHOLA NATH AND ANOTHER  
(DEFENDANTS)\*

*Transfer of Property Act (IV of 1882), sections 6(e) and 130—  
Actionable claim—Claim for a definite sum of money—  
“Debt”—Usufructuary mortgage—Unpaid portion of the  
loan remaining with the mortgagee—Whether transferable by  
mortgagor.*

A usufructuary mortgage was executed, and Rs.1,300 out of the mortgage money was left in the hands of the mortgagee for the satisfaction of a decree which a third party might obtain in a suit then pending against the mortgagor. Rs.1,256 was actually paid by the mortgagee in satisfaction of the third party's decree, leaving a balance of Rs.44 with the mortgagee. The mortgagor assigned the right to recover this amount to the plaintiff, and the question was whether the assignment was valid and the plaintiff could sue:

*Held*, that a claim for a definite sum of money which the defendant is bound to pay is a claim which can be assigned as an actionable claim within the meaning of section 130 of the Transfer of Property Act, and such a transfer is not prohibited by section 6(e) of the Act. A “debt” is an obligation to pay a liquidated or certain sum of money, and the definition of actionable claim includes such equitable choses in action as debts. The terms of the mortgage deed in the present case implied a promise to pay the surplus balance in the hands of the mortgagee to the mortgagor, and the balance was accordingly a “debt”.

Mr. *Shiva Charan Lal*, for the appellant.

Mr. *Kamta Prasad*, for the respondents.

SULAIMAN, C.J., and BENNET, J.:—This is a second appeal by the plaintiff whose suit was decreed by the trial court, but dismissed by the lower appellate court. The suit is somewhat peculiar. The defendant No. 2, Roshan Singh, executed a usufructuary mortgage of his

\*Second Appeal No. 1650 of 1935, from a decree of S. Riazuddin Ahmad, Additional Civil Judge of Aligarh, dated the 26th of November, 1934, modifying a decree of Mehdi Ali, Honorary Munsif of Aligarh, dated the 5th of October, 1933.

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immovable property on the 11th of September, 1931, in favour of defendant No. 1, Bhola Nath, for a sum of Rs.4,800, and the mortgage deed specified that out of this amount Rs.1,300 were left with the mortgagee for payment to one Khazan Singh in case Khazan Singh obtained a decree against the mortgagor in a suit, the nature of which is not specified, which was then pending. It was further stipulated that in case Khazan Singh's suit against the mortgagor was dismissed the mortgagor would be entitled to recover the Rs.1,300 from the mortgagee. But there was no provision in the deed as to what was to happen if the suit was decreed for a less sum than Rs.1,300. Eventually the suit of Khazan Singh was decreed for Rs.1,246-1-6, leaving a balance of Rs.53 odd in the hands of the mortgagee. The mortgagor, defendant No. 2, assigned the right to recover this amount to the plaintiff, who has brought the present suit for recovery of the amount with interest. In the written statement defendant No. 1 pleaded that he had paid a slightly larger amount, Rs.1,256-15-6, to Khazan Singh and he admitted that the balance of Rs.43-0-6 was due to defendant No. 1. In regard to this balance he claimed the right to set off the amount due to him from defendant No. 2 in respect of two decrees, and also Rs.80 as interest due in respect of the said mortgage.

The judgment of the lower appellate court states that the appellant, defendant No. 1, abandoned all the grounds in his appeal and relied only on a point of law that the transfer deed from defendant No. 2 to the plaintiff, dated the 10th of August, 1933, was a transfer of a mere right to sue and that such a transfer was contrary to section 6(e) of the Transfer of Property Act. The lower appellate court has held that this contention is correct and that the right to sue could not be transferred, and has dismissed the suit of the plaintiff. The lower appellate court has not referred to the provisions of section 130 of the Transfer of Property Act which deals with the transfer of an actionable claim. The question

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before us is whether such right as the defendant No. 2 had against defendant No. 1 was a mere right to sue, which is the subject of section 6(e) of the Transfer of Property Act, or was an actionable claim, which is the subject of section 130. Now the court below has referred to various rulings, but we have before us a ruling of their Lordships of the Privy Council in *Manmatha Nath Mullick v. Hedait Ali* (1). This ruling is on a somewhat similar case where a mortgagor leased certain properties which had been mortgaged to a lessee and the lessee undertook to pay the lessor a yearly rent and in addition the Government revenue, cesses and other public demands. The mortgagees brought a suit on their mortgage and the two taluks in question were put up to auction sale on a mortgage decree and purchased by the plaintiff in 1924. Certain revenue and cesses were then due to Government and in order to save the taluks from sale the plaintiff paid these instalments to the Collector. The plaintiff then brought a suit against the lessee who was still in possession. In that suit the plaintiff relied not only on his position as auction purchaser of the proprietary right, but also on a deed of assignment executed by the original lessor in favour of the plaintiff by which the lessor assigned his right to recover the instalments in question and also constituted the plaintiff his attorney for purposes of suing for those instalments. Their Lordships stated as follows (page 271):

“The clause in the Transfer of Property Act on which the judgment is based is section 6(e) which is in these terms: ‘A mere right to sue cannot be transferred.’ Their Lordships are clearly of opinion that this clause has no application to the facts of the present case. In their Lordships’ opinion what was assigned to the appellant was not a mere right to sue but a claim for a definite sum of money which the lessee was bound by his contract with Banerji (the lessor) to repay to him. This would, their Lordships think, be an actionable claim to which section 130 of the Act would apply. The failure of the lessee to fulfil this obligation does not give rise to a claim of damages

(1) (1931) I.L.R., 11 Pat., 266.

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within the meaning of the clause in the lease on which the High Court found, but to a claim for reimbursement of the precise sum which the landlord had disbursed to meet the obligation . . . . This right having been assigned by a formal deed to the appellant, who has moreover been constituted by the same deed Banerji's attorney to recover the instalments in question, there is on both heads a clear answer to the contention which the High Court sustained that he had no title to sue."

Their Lordships therefore in that case considered that the fact that there was a claim for a definite sum of money which the lessee was bound by his contract to pay showed that it was a claim which could be assigned as an actionable claim within the meaning of section 130 of the Transfer of Property Act. We consider that a "debt" is an obligation to pay a liquidated or certain sum of money. This has been laid down in *Webster v. Webster* (1); for example, the right to recover a definite sum of money in the hands of an agent is a "debt" which may be assigned. On the other hand all claims under contract are excluded by section 6(e) of the Transfer of Property Act except claims to the payment of a liquidated sum of money, or debt, or price. As section 6 originally stood it stated in clause (e): "A mere right to sue for compensation for fraud or for harm illegally caused cannot be transferred." By the Transfer of Property (Amendment) Act, Act II of 1900, the words "for compensation for a fraud or for harm illegally caused" were omitted, and the sub-section now states "a mere right to sue cannot be transferred". But this must be read in connection with section 130. The definition of actionable claim has been extended to include such equitable choses in action as debts or beneficial interests in movable property, whether existent, accruing, conditional or contingent. Some argument was made as to whether the terms of the mortgage deed in the present case would imply that the balance left after paying the decree of Khazan Singh, if any, was to be repaid by the mortgagee to the mortgagor. We consider that the deed does imply this condition as the deed sets out clearly that if

(1) (1862) 31 Beav., 393.

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no sum was paid to Khazan Singh, then the whole Rs.1,300 was to be paid by the mortgagee to the mortgagor. The inference is that any balance would be paid. We may also refer to the point that in the written statement, paragraph 6, there is a clear admission by the contesting defendant No. 1.

Learned counsel for the respondents has referred to the ruling in *Khunni Lal v. Bankey Lal* (1) on which the lower appellate court relied. That ruling laid down that the unpaid portion of the mortgage money in the hands of the mortgagee holding a usufructuary mortgage is not a "debt" due from the mortgagee to the mortgagor which can be attached by a person who holds a money decree against the mortgagor. This, however, is a different case, and in that particular case the court held that the balance was not money which was owing. On the other hand we consider that in the present case the terms of the mortgage deed imply a promise to pay the balance to the mortgagor. In the mortgage deed in the ruling quoted there was a sum of Rs.25,000 left with the mortgagee for payment to one Lala Nand Lal Shah. There was no promise that if the money was not paid to that person, then the money would be paid to the mortgagor, and in that respect the present case differs. For these reasons we allow this second appeal with costs and setting aside the decree of the lower appellate court restore that of the trial court with costs throughout.

Before Mr. Justice Harries and Mr. Justice Rachhpal Singh

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 March, 2

ROBERT HERCULES SKINNER (OPPOSITE PARTY) v. JAMES R. SKINNER (APPLICANT)\*

*Civil Procedure Code, section 144—Restitution—"Court of first instance"—Re-distribution of territorial jurisdiction—Which court competent to deal with restitution—Civil Procedure Code, section 150—Bengal, Agra and Assam Civil Courts Act (XII of 1887), section 17—Civil Procedure Code, order XLV,*

\*First Appeal No. 164 of 1932, from a decree of Shankar Lal, Civil Judge of Bulandshahr, dated the 27th of February, 1932.

(1) [1934] A.L.J., 713.