

APPELLATE CIVIL

Before Mr. Justice Bennet and Mr. Justice Verma.

WAHID UDDIN (PLAINTIFF) *v.* MAKHAN LAL AND ANOTHER
(DEFENDANTS)*

1938
May, 4

U. P. Agriculturists' Relief Act (Local Act XXVII of 1934), section 33—Applicability to usufructuary mortgage—Applicability to lands outside United Provinces—Local legislatures, powers of—Government of India Act, 1919 (5 and 6 Geo. V. c. 61), section 80A(1) and (3).

A usufructuary mortgage, executed by way of security for a loan, is a transaction of loan in its essence, and the mortgagor is a "debtor" of the mortgagee. Even if the mortgagee is not entitled to sue for the recovery of his money at any time he likes, the liability of the mortgagor for repayment is present and he does not cease to be a "debtor" in the eyes of the law. Accordingly section 33 of the U. P. Agriculturists' Relief Act is applicable to a usufructuary mortgage.

The local legislature of one province has no power to make laws affecting rights in lands situate outside the territories of that province. The previous sanction or the subsequent assent of the Governor-General to a Local Act does not give the local legislature any such power. The effect of sub-section (3) of section 80A of the Government of India Act, 1919, is that without the previous sanction or the subsequent assent of the Governor-General the local legislature of a province cannot validly make any such laws even for its own territories, and the previous sanction or subsequent assent only makes such laws valid and effective within the territories of that province. Accordingly, section 33 of the U. P. Agriculturists' Relief Act, which is not a provision merely affecting rules of procedure but one affecting substantive rights, cannot affect rights in lands situate outside the United Provinces.

So where a usufructuary mortgage comprised lands situate in the province of Delhi as well as lands situate in the United Provinces, and the mortgage was indivisible and no apportionment of the mortgage money could be made, it was held that no suit under section 33 of the U. P. Agriculturists' Relief Act was maintainable in respect of this mortgage, as any decree passed under section 33 would inevitably affect rights in the property in the province of Delhi.

*First Appeal No. 406 of 1936, from a decree of S. Riazuddin Ahmad, Second Civil Judge of Meerut, dated the 1st of October, 1936.

1938

WAHID
UDDIN
v.
MAKHAN
LAL

Sir Syed Wazir Hasan and Messrs. P. L. Banerji, S. N. Seth and B. N. Misra, for the appellant.

Sir Tej Bahadur Sapru, Dr. S. N. Sen and Dr. N. P. Asthana, for the respondents.

BENNET and VERMA, JJ.:—This is an appeal by the plaintiff in a suit brought by him under section 33(2) of the U. P. Agriculturists' Relief Act, No. XXVII of 1934, praying "that the amount payable by the plaintiff to the defendants under the document dated the 4th of February, 1932, executed by the plaintiff in favour of the defendants for Rs.1,00,000 may be declared after deducting the amount paid and fixing the rate of interest."

The plaintiff appellant alleged that he was an "agriculturist" within the meaning of the Act; that he was an old resident of the United Provinces, and was entitled to the relief claimed; that he had executed a document for Rs.1,00,000 in favour of the defendants on the 4th of February, 1932; that the major portion of the property hypothecated under the said document lay in the United Provinces of Agra and Oudh, but at the instance of the defendants some property situate in the province of Delhi was also mentioned in the document simply with the view that the document might be registered in Delhi; that the rate of interest agreed upon, and mentioned in the document, was 0-12-6 per cent. per mensem compoundable six monthly; that in lieu of the interest aforesaid a lease was executed by the plaintiff in favour of the defendants on the 4th of February, 1932; that as a matter of fact the two documents were parts of the same transaction and the object was to secure the payment of the interest; that the plaintiff had made payments towards principal and interest, the amount of which was far in excess of the interest payable under the provisions of the U. P. Agriculturists' Relief Act; that the surplus should be set off against the principal; and that the plaintiff was entitled to the declaration prayed for.

1938

 WAHID
 UDDIN
 v.
 MAKHAN
 LAL

The defendants pleaded that the plaintiff was not an "agriculturist" within the meaning of that word in the Act; that the document executed by the plaintiff in their favour on the 4th of February, 1932, was a deed of usufructuary mortgage; that the property situate in the province of Delhi was of considerable value and had not been entered in the document fictitiously simply with the object of securing registration in that province; that it was agreed upon between the parties that the profits, which the property was capable of yielding, would amount to such a sum as would give the mortgagees a return which was equal to 0-12-6 per cent. per mensem compoundable six monthly on the amount advanced; that the defendants, usufructuary mortgagees, then gave a lease of the property to the plaintiff with the stipulation that the latter would pay a certain sum of money periodically to the lessors; that the relationship of lessor and lessee was thereby created between the parties; that the payments made by the plaintiff have all been duly credited; that the Agriculturists' Relief Act did not apply to the transaction in question; and that the plaintiff was not entitled to the relief claimed.

The court below has held that the plaintiff was an "agriculturist"; that the suit was cognizable by it, but that the transaction in question was a usufructuary mortgage; and that, therefore, the plaintiff was not a "debtor", and so was not entitled to maintain the suit, as in addition to being an "agriculturist" a person must also be a "debtor" in order to have the right to bring a suit under section 33 of the Act.

The learned counsel for the appellant has urged before us (1) that the court below has erred in holding that the transaction in question was a usufructuary mortgage and should have held that it was an anomalous mortgage, and (2) that in any case, even if the transaction was a usufructuary mortgage, pure and simple, the view that the mortgagor was not a "debtor" of the

1938

WAHID
UDDIN
v.
MAKHAN
LAL

mortgagee is erroneous. We are of opinion that both these contentions are well founded. We take the second point first. A mortgage, as defined in section 58 of the Transfer of Property Act, is "a transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt or the performance of an engagement which may give rise to a pecuniary liability." Thus the essence of the transaction is a loan. The person who executes the mortgage deed takes an advance of money, or, to put it in other words, takes a loan from the person in whose favour the deed is executed. The transfer of the interest in the immovable property is only for the purpose of securing the payment of the money advanced by way of loan. The section further provides that the principal money and interest of which payment is secured for the time being are called the mortgage money. Mortgages may be of several kinds, one of them being a usufructuary mortgage which is thus defined in clause (d) of the section: "Where the mortgagor delivers possession or expressly or by implication binds himself to deliver possession of the mortgaged property to the mortgagee, and authorises him to retain such possession until payment of the mortgage money, and to receive the rents and profits accruing from the property, or any part of such rents and profits and to appropriate the same in lieu of interest, or in payment of the mortgage money, or partly in lieu of interest and partly in payment of the mortgage money, the transaction is called a usufructuary mortgage, and the mortgagee a usufructuary mortgage." Thus a usufructuary mortgage also is a transfer of an interest in immovable property for the purpose of securing the payment of money advanced, and the object of giving possession to the mortgagee and authorising him to retain possession is to provide for the payment of interest or principal or both. In our judgment the

transaction, by taking the form of a usufructuary mortgage, does not cease to be one of *loan* in its essence. The U. P. Agriculturists' Relief Act does not define "debt" and "debtor", but it does define "loan", that definition being: " 'Loan' means an advance to an agriculturist, whether of money or in kind, and shall include any transaction which is in substance a loan, but shall not include (i) a loan advanced by the Local Government or by any Municipal, District or Cantonment Board authorised by the Local Government to advance loans, or by a co-operative society; (ii) except for the purposes of sections 7, 8, 33(1), 35, 36 and 39(1), (3) and (4), small loans not exceeding Rs.20 repayable within a year in fixed equated instalments the total of which does not exceed the principal by more than 10 or 20 per cent. according as the instalments are spread over a period of less than six months or more than six months, provided that no further interest is charged in addition to fixed equated instalments; and (iii) a loan of agricultural produce repayable at the next harvest with not more than one-quarter of the quantity of the said produce by way of interest." It will be noticed that the legislature mentions three exceptions, but a usufructuary mortgage is not one of them. We are of opinion that the mortgage money advanced by a usufructuary mortgagee also is clearly within this definition. The Act defines "creditor" in sub-section (7) of section 2. The legislature, having defined "loan", evidently did not think it necessary to define "debt" and "debtor". In Wharton's Law Lexicon "debt" is defined as "a sum of money due from one person to another", and "debtor" as "he that owes some money to another". We are clearly of opinion that a person borrowing a loan and giving a usufructuary mortgage in lieu thereof owes money to the mortgagee, and incurs a "debt" and is a "debtor" of his mortgagee. The court below has taken the view that if the creditor is not entitled to sue for the recovery

1938

WAHID
UDDIN
v.
MAKHAN
LAL

1938

WAHID
UDDIN
v.
MAKHAN
LAL

of his money at any time he likes, the person to whom he has advanced the loan is not a "debtor" in the eyes of the law. In our judgment this view is not correct. All that happens in the case of a usufructuary mortgage is that, by the peculiar nature of the security given for the payment of the money advanced, the mortgagee is not entitled to sue for the mortgage money except in certain contingencies provided for in the Transfer of Property Act. But the delivery of possession is only a mode of payment of the interest, or the principal, or both. Even where profits are agreed upon to be equal to the interest on the advance made, the liability to repay the principal amount is present. If the borrower does not repay the money borrowed within the period of limitation, the lender becomes the owner of the property which has been in his possession as security for his loan, and that is tantamount to the repayment of the money which he had advanced.

In addition to what has been said above, there is this further point in this case that the transaction in question is not in our opinion a usufructuary mortgage pure and simple. The mortgagor says in the mortgage deed: "I have now mortgaged with possession and *pledged* the entire property. . . ." There are various other portions of the deed which also are not reconcilable with a usufructuary mortgage pure and simple, for example, clauses (iii), (x) and (xi). We are, therefore, of opinion that the decision of the court below cannot be supported on the ground on which it rests.

The learned counsel for the respondents, however, has urged another ground in support of the dismissal of the suit. His contention is that a portion of the property mortgaged under the deed in question being admittedly situate in another province, viz., the province of Delhi, the provisions of the U. P. Agriculturists' Relief Act cannot be applicable to that portion of the mortgaged property, and as the mortgage is indivisible,

1938

WAHID
UDDIN
v.
MAKHAN
LAL

this suit under the provisions of section 33 of the U. P. Agriculturists' Relief Act is not maintainable. The learned counsel has shown by a comparison of the list of the mortgaged property given in the deed, dated the 4th of February, 1932, and the schedule appended to the Delhi Laws Act (Act VII of 1915), that items 3 and 5 to 9 of the mortgage deed are also in Delhi province. Thus, out of the ten items mortgaged, items 1 to 9 are situate in the province of Delhi, and were so situate on the 4th of February, 1932. Learned counsel for the respondents urges that the local legislature of the United Provinces of Agra and Oudh had no power to make any laws affecting lands situate outside the territories for the time being constituting the United Provinces. The U. P. Agriculturists' Relief Act was passed in the year 1934 and came into force in 1935. Thus the question that arises for consideration is whether a mortgagor owning property in the United Provinces as well as in another province, who has mortgaged properties situate in both the provinces under one deed in lieu of a single advance, is entitled to take advantage of the provisions of section 33 of the Agriculturists' Relief Act passed by the local legislature of the United Provinces. It is to our minds clear that the provisions of the U. P. Agriculturists' Relief Act do affect the rights of mortgagees, who under the Transfer of Property Act are transferees of an interest in immovable property, in the lands mortgaged. We are of opinion that the contention of the learned counsel for the respondents is well founded. It seems to us that the point that the laws made by the local legislature of one province cannot affect rights in lands situate outside the territories for the time being constituting that province, is clear. The learned counsel for the respondents has referred to section 80A, sub-section (1), of the Government of India Act of 1919, which immediately preceded the Government of India Act, 1935. The learned counsel for the appellant has in reply referred to

1938

WAHID
UDDIN
v.
MAKHAN
LAL

sub-section (3) of that section and has contended that all that section 33 of the U. P. Agriculturists' Relief Act does is to make a provision which affects rules of procedure. We find it difficult to follow this argument, for the Act affects and is intended to affect substantive rights. In our opinion this argument of the learned counsel for the appellant has no force. The learned counsel for the appellant further seems to think that sub-section (3) of section 80A of the Government of India Act, mentioned above, means that if the local legislature of a province has obtained the previous sanction of the Governor-General, it can make laws of the kind mentioned in clauses (a) to (i) of the sub-section so as to affect rights and properties not only within the boundaries of that province but also outside those boundaries. In our judgment this is not correct. The effect of sub-section (3) is that without the previous sanction of the Governor-General, or at any rate his subsequent assent as mentioned in the proviso to the sub-section, the local legislature of a province cannot validly make any such laws even for its own territories, and the previous sanction, or the subsequent assent, of the Governor-General only makes such laws valid and effective within the territories of that province.

Further arguments on behalf of the appellant were addressed to us by Mr. *P. L. Banerji*, who has argued that there was no bar to the passing of a declaratory decree as contemplated by section 33 of the Agriculturists' Relief Act. His contention is that the mortgagee, if and when he desires to realise his money, should bring a suit on the mortgage in the court in Delhi, obtain a decree and execute it there and try to realise the whole amount due to him from the property situated in Delhi province, and that if any balance is left over after the entire property in that province had been sold, he should then proceed against the property situated in this province and that when he does so he would not be entitled to realise from this property more than the amount

declared in this suit under section 33 of the Agriculturists' Relief Act. We do not agree with this contention. The respondents advanced the loan in consideration of the security of the entire mortgaged property being given. The mortgage is indivisible and no apportionment of the mortgage money can be made. The amount due under the deed is a charge on the entire property situate in both the provinces. Sub-section (2) of section 33 of the Agriculturists' Relief Act provides that chapter IV of the Act and the Usurious Loans Act shall be followed. In other words, the interest is to be reduced, accounts have to be taken and then a decree has to be passed. It is clear therefore that any decree passed under section 33 of the Act will affect rights in the property in Delhi. That in our opinion is not permissible.

For the reasons given above we hold that the suit was not maintainable. We accordingly affirm the decree of the court below dismissing the suit, and dismiss this appeal with costs.

1938

 WAHID
 UDDIN
 v.
 MAKHAN
 LAL

 APPELLATE CRIMINAL

Before Mr. Justice Bennet and Mr. Justice Verma

EMPEROR v. BALKU*

1938

 June, 13

Indian Penal Code, section 300, exception 1—Culpable homicide not amounting to murder—Grave and sudden provocation—Seeing act of adultery of wife—Interval of time between the seeing and the killing of the paramour.

The accused and his wife's sister's husband, Budhu, were sleeping on the same *charpai* in the verandah, and the accused's wife was sleeping in the adjoining room. Some time in the night Budhu got up and went into the room and bolted the door behind him. The accused also got up and peeping through a chink in the door saw Budhu and the accused's wife having sexual intercourse. The accused returned to his *charpai* and lay down on it. After some time Budhu came out of the room and lay down on the *charpai* by the side of the accused. After a short time, when Budhu began dozing, the accused stabbed him several times with a knife and killed

*Criminal Appeal No. 67 of 1938, from an order of Ganga Prasad Verma, Sessions Judge of Farrukhabad, dated the 11th of January, 1938.