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outcome of any transaction which may be characterised "in substance" as "a transaction of loan".

For the reasons given above we hold that the court below had no jurisdiction to convert the decrees held by Chaturbhuj applicant into decrees for payment by instalments.

The view that we take is opposed to the decisions of the Oudh Chief Court in *Nihal Singh v. Ganesh Dass Ram Gopal* (1) and *Yusuf Husain Beg v. Waqar Ali Beg* (2), but for the reasons given above we respectfully dissent from those decisions.

We accordingly allow these two applications in revision, set aside the orders passed by the court below and dismiss the applications filed by Mauji Ram opposite party for the conversion of the two decrees into decrees payable by instalments. The applicant is entitled to his costs both in this Court and in the courts below.

Before Mr. Justice Bennet, Mr. Justice Ismail and
Mr. Justice Verma

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KANHAIYA PRASAD (PLAINTIFF) v. HAMIDAN AND OTHERS
(DEFENDANTS)*

Transfer of Property Act (IV of 1882), section 58—Mortgage of mixed character partly simple and partly usufructuary—Possessory mortgage with covenant to repay but not conferring a right of sale—Whether decree for sale can be passed—Transfer of Property Act (IV of 1882), sections 67, 68 (old)—Deprivation of part of mortgaged property—Suit for mortgage money—Decree for sale of mortgaged property—Contract Act (IX of 1872), section 62—Novation—Subsequent contract turning out to be invalid—Suit on original contract valid.

Where in a mortgage there are certain provisions which indicate a usufructuary mortgage and certain provisions which

*Second Appeal No. 1303 of 1934, from a decree of M. O. Karney, Civil Judge of Cawnpore, dated the 7th of September, 1934, confirming a decree of Manzoor Ahmad Khan, Munsif of Akbarpur, dated the 29th of November, 1933.

(1) A.I.R. 1937 Oudh, 124.

(2) A.I.R. 1937 Oudh, 487.

indicate a simple mortgage, and contains a bare covenant to repay unaccompanied by any hypothecation or provision that on failure to pay the money the mortgaged property would be sold, there is no right of sale on failure to repay the mortgage money.

A mortgage deed comprised one entire house and a one-sixth share of another house. The terms of the mortgage were: (1) the mortgage was with possession, (2) there was a promise to repay the mortgage money but there was no covenant of hypothecation or provision that in the event of non-payment the mortgagee would have a right to cause the mortgaged property to be sold, (3) there was a promise to pay the stipulated interest monthly, (4) there was a stipulation that if the mortgaged property was found subject to any dispute and the mortgagee had to spend anything or if the whole or part of the mortgaged property passed out of the possession of the mortgagee, the person and property of the mortgagor would be liable for payment of an amount to that extent. The mortgagor, however, had title to only a one-twelfth share in the second house, and even this share was lost to the mortgagee by being sold in auction in execution of a decree against the mortgagor: *Held* (1) that on this mortgage there was no right to sue for sale of the mortgaged property for failure to repay the mortgage money, but (2) as the mortgagee was deprived of part of his security by the wrongful act of the mortgagor and the mortgagor failed to secure the mortgagee in the possession thereof, clause (b) or (c) of section 68 (old) of the Transfer of Property Act applied, and, read with section 67, conferred a right to sue for sale of the mortgaged property.

In a later mortgage between the parties it was provided that the mortgage money due on the earlier mortgage (in suit) would be part of the consideration of the later deed. It turned out that this later deed was invalid as regards part of the mortgaged property: *Held*, that it was doubtful how far section 62 of the Contract Act would apply to cases of transfer of property, and, in any case, inasmuch as the later deed was partly invalid, the mortgagee was entitled to sue on the earlier mortgage deed.

Mr. M. L. Chaturvedi, for the appellant.

Drs. S. N. Sen and M. L. Agarwala and Messrs. G. S. Pathak, S. Munir Ahmad and A. M. Gupta, for the respondents.

BENNET, J.:—This is a second appeal by the plaintiff whose suit has been dismissed in the two lower

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courts. The case has been referred to a Full Bench. The facts are that the plaintiff obtained a mortgage deed executed by one Bachnu on the 17th of April, 1923. It is on this document that the plaintiff brings his suit for sale and one of the points found against the plaintiff by the two lower courts is that this document does not give the plaintiff any right of sale of the property comprised in it. We may before considering this document mention briefly the facts that have taken place in this case. This document was a mortgage, firstly of a house No. 80/10 in Quli Bazar in Cawnpore, and secondly of 6/36 sihams of another house No. 55/69 (present No. 55/79) in Nayaganj. Now the mortgagor Bachnu did not really have this share in the second house but only had 3/36 sihams. This second house was owned by Mst. Idan to the extent of 6 sihams and she was the first wife of the mortgagor Bachnu and she made a gift to him of the 6 sihams but this gift was held invalid. Bachnu considered that he was her sole heir but he was only the heir of half the property, that is, 3 sihams and the other half was inherited by Husain Bakhsh. Another point which arose was that on the 9th of December, 1924, the share of Bachnu in this house was put up to auction sale on a simple money decree against him and was purchased by defendant No. 5, Baikunth Narain, who sold it later to defendant No. 4, Muhammad Ali. Now Husain Bakhsh brought suit No. 57 of 1931 against the heirs of Bachnu and it was held in that suit that Bachnu was only entitled to 3 sihams. The present plaintiff, Kanhaiya Prasad, was also a party to that suit. At the same period there was another suit No. 916 of 1930, by defendant No. 4, Muhammad Ali, against the plaintiff and heirs of Bachnu in which it was held that Muhammad Ali was entitled to possession. In that suit the plaintiff had claimed that he (the plaintiff) was entitled to retain possession under his mortgage of the 17th of April, 1923, as a usufructuary mortgagee. Muhammad Ali,

on the other hand, contended that it was a simple mortgage. The Munsif in that suit held that it was a simple mortgage and that the plaintiff had no right to hold possession. Another complication arises from the fact that on the 29th of March, 1927, there was another mortgage deed executed by Bachnu of the same property as in the earlier deed and he mortgaged now with possession by conditional sale and made the amount due under his former mortgage part of the consideration of the mortgage of 1927. It is contended by the defence that this document terminated the validity of the mortgage deed in suit under the provisions of section 62 of the Contract Act. The mortgage deed of 1927 was followed by two documents executed on the 3rd of October, 1928, by the heirs of Bachnu. One of these documents was a sale deed, setting out the former mortgage deeds and stating that the mortgage money due under the deed of 1927 was the consideration for the sale deed of the share in house No.55/69. There was a mortgage deed of the same date also for the consideration due under the mortgage of 1927.

The first question now which I consider is whether the mortgage deed of the 17th of April, 1923, as it stands, entitles the plaintiff to a decree for sale of the mortgaged property. The mortgage deed has certain conditions. One of these states: "I have mortgaged with possession on the conditions laid down below. . . ." This no doubt is a statement that the mortgage is one with possession but a mere statement is not sufficient. The document states further that the property is mortgaged for Rs.1,000 at the rate of Rs.1-8-0 per cent. per mensem, promising to pay the same within a year. There is here, I consider, a definite promise to pay the mortgage money and interest within a year and I consider that the lower appellate court was incorrect in holding that this clause merely implied a right of redemption. The first condition laid down: "I shall continue to pay Rs.15 the amount of interest fixed every month to

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Hakim Saheb and shall obtain receipt." There is here a clear provision to pay the interest, as this Rs.15 per month is exactly the amount of interest which accrues at Rs.1-8-0 per cent. on Rs.1,000 mortgage money. Clause (2) states: "I the mortgagor shall be responsible for the repairs to the house mortgaged. The mortgagee shall have nothing to do therewith. In case the mortgagee has to spend anything, I, the executant, shall be liable for payment of the same. Clause (4) states: "If during the stipulated period the mortgagee is led to believe that the said property mortgaged is subject to any charge or if I sell or mortgage it to any one without the knowledge and information of Hakim Saheb, the mortgagee shall have power to cancel the stipulated period and to realise by instituting a suit the entire amount due to him from my movable and immovable properties." This no doubt indicates that there is a right to sue for the mortgage money but it does not provide that the mortgaged property should be hypothecated for this purpose. On the contrary the clause provides that the movable and immovable property of the mortgagor should be liable. The fifth clause states: "If the property mortgaged is found subject to any dispute, I, the mortgagor, shall be liable to set up a defence, the mortgagee shall have nothing to do therewith. In case the mortgagee has to spend anything, or the whole or part of the property mortgaged passes out of the possession of the mortgagee, my person and property shall be liable for payment of an amount to that extent." That is the case which has arisen, as a part of the property, namely the share in the house in Nayananj, has passed out of the possession of the mortgagee, but the remedy given is not that there should be a suit for sale of the mortgaged property but that the person and property of the mortgagor would be liable. The document, therefore, as it stands is lacking in one of the necessary conditions of a simple mortgage deed laid down by section 58 of the Transfer of Property Act

sub-section (b). That sub-section lays down that the mortgagor should bind himself personally to pay the mortgage money and agree expressly or impliedly that in the event of his failing to pay according to the contract the mortgagee shall have a right to cause the mortgaged property to be sold. Although there is a personal covenant to pay, I find that there is no covenant that the mortgagee shall have a right to cause the mortgaged property to be sold. In other words, there is no hypothecation of the property in this deed. Again the deed is not a complete usufructuary mortgage because in section 58 (d) it is laid down that in a usufructuary mortgage there is an authorisation "to receive rents and profits accruing from the property and to appropriate them in lieu of interest". There is no such stipulation in this deed. On the contrary, the deed provides that the Rs.15 interest should be paid every month by the mortgagor. It is true that in evidence the plaintiff has stated that there is some arrangement which apparently amounted to this that Bachnu should realise rents from tenants and pay them to the plaintiff. We do not consider, however, that some contradictory and vague evidence on this point can vary the terms of the mortgage deed as it stands.

Considerable argument was made as to what is the proper legal effect of the document of this nature, and learned counsel for the appellant contended that because there was a promise to pay therefore section 68 would apply, that the mortgagee has a right to sue for the mortgage money where the mortgagor binds himself to pay the same, and that under section 67 a decree should be for sale. On the other hand it was argued that as there is no hypothecation in the present case the decree in such a case should be a simple money decree, and as the period of six years has long ago expired since 1923, the suit having been brought on the 1st of June, 1933, no simple money decree could be granted.

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We do not find that there is any ruling which exactly covers the case but we refer to a number which have been laid before us. In *Jafar Husain v. Ranjit Singh* (1) there was a mortgage deed which was also of a mixed character and it was held that the plaintiff mortgagee had a right under the conditions set out in the deed to bring a suit for sale. One of these conditions shown on page 6 was clause (6), "that until the full payment of the mortgage money the mortgaged property shall in every way remain liable for damages, interest and deficiency of profits." This amounted to a clear hypothecation of the property for the mortgage money. It was a mortgage which provided in clause (1) for possession of villages to be given to the mortgagee. The learned counsel for the appellant relied on certain observations of BANERJI, J., on page 11 where he agreed with two rulings of the Madras High Court, one in *Ramayya v. Guruvu* (2) and the other in *Sivakami Ammal v. Gopala Savundram* (3) and he stated that in those rulings it was held that where a mortgage is a usufructuary mortgage but has a covenant in it to pay the mortgage debt, then the mortgagee has a right to sue for sale. We have examined those Madras rulings and find that they did not assign any reasons for the conclusions at which the Court arrived and the opinion of the Court is merely stated categorically. Now in a later ruling of this High Court in *Kashi Ram v. Sardar Singh* (4) the observations of BANERJI, J., were specifically differed from by the Bench and it was laid down that "Where a mortgage is in other respects a usufructuary mortgage the insertion therein of a personal covenant to pay the mortgage debt on demand, unaccompanied by any hypothecation of the property the subject of the mortgage, cannot alter the character of the mortgage and give the mortgagee a right to sell the

(1) (1898) I.L.R. 21 All. 4.

(2) (1890) I.L.R. 14 Mad. 232.

(3) (1893) I.L.R. 17 Mad. 131.

(4) (1905) I.L.R. 28 All. 157.

mortgaged property in the event of non-payment of the mortgage debt." That ruling has been followed in this High Court. Now the learned counsel mentioned a ruling of their Lordships of the Privy Council in *Lal Narsingh Partab v. Yaqub Khan* (1). In that ruling it was laid down that under a mortgage which is a combination of a simple and a usufructuary mortgage, if the mortgagor does not deliver possession it is open to the mortgagee to sue for his mortgage money under section 68 of the Transfer of Property Act, and in such a case a decree for sale can be made in his favour under section 67 of the Act. The ruling proceeded to deal with the case of non-delivery of possession and it did not deal with the right to obtain a decree for sale independent of the non-delivery of possession under section 68. Moreover, on page 365 it is mentioned that in clause (5) it was provided that if the mortgagors failed to pay the mortgage money and failed to redeem the mortgage at the appointed time, then the mortgagee should have power to realise the money due to him by sale of the mortgaged property, etc. There was therefore a clear hypothecation in that case. So the difficulty which is at present before us did not and could not arise. On the other hand, on behalf of the respondents it is urged that in *Kamal Nayan Prasad v. Ram Nayan Prasad* (2) and *Mohammad Abdullah v. Mohammad Yasin* (3) there were cases of a usufructuary mortgage with a covenant to pay and it was held that there was no right to sue for sale, but in both those mortgage deeds it was provided that if there was a failure to pay then the mortgagee should remain in possession. We are of opinion that that clause differentiated those cases from the present, as when it was provided that the mortgagee should remain in possession on the failure to pay, it implied that there would be no right to sell. In *Krishna Bhaichand v*

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(1) (1929) I.L.R. 4 Luck. 363.

(2) A.I.R. 1930 Pat. 152

(3) A.I.R. 1933 Lah. 151.

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Hari Janardhan (1) the Court followed the ruling of this High Court in *Kashi Ram v. Sardar Singh* (2) and specifically dissented from the observations of BANERJI, J., reported in *Jafar Husain v. Ranjit Singh* (3). Having regard to these rulings in a mortgage of the nature of the mortgage before us, where there are certain provisions which indicate a usufructuary mortgage and certain provisions which indicate a simple mortgage, but merely a covenant to pay without any hypothecation or provision that on failure to pay the mortgaged property could be sold, we consider that we should not hold that there is any right of sale on the mere failure to pay the mortgage money.

The next point which arises before us is whether the plaintiff has a right of sale under sections 67 and 68 of the Transfer of Property Act arising from the fact that the plaintiff has been deprived of a part of the mortgaged property, that is 6 sihams out of 36 sihams in the house at Nayaganj. The plaintiff lost half or 3 sihams of it by the auction sale of the 9th of December, 1924, when defendant No. 5 purchased this property, and the other 3 sihams were lost to the plaintiff by the decree in suit No. 57 of 1931 in which it was held that Husain Bakhsh was entitled to the other 3 sihams. By these two transactions, therefore, the plaintiff has lost the entire share in the house in Nayaganj. Now it was contended by learned counsel for the respondents that this loss would not bring the case under section 68 (b) or (c). Section 68 (as it stood before the amendment of 1929) provides: "The mortgagee has a right to sue the mortgagor for the mortgage money in the following cases only: (a) Where the mortgagor binds himself to repay the same: (b) Where the mortgagee is deprived of the whole or part of his security by or in consequence of the wrongful act or default of the mortgagor: (c) Where, the mortgagee being entitled to possession of the property, the mortgagor fails to deliver the same

(1) (1908) 10 Bom.L.R. 615.

(2) (1905) I.L.R. 28 All. 157.

(3) (1898) I.L.R. 21 All. 4.

to him, or to secure the possession thereof to him without disturbance by the mortgagor or any other person." We may note that the Transfer of Property Act which governs the case is the Act of 1882, before the amendments were introduced by Act XX of 1929. Section 63 of Act XX of 1929 provides that the sections of that Act by which amendments were made in sections 67 and 68 do not apply to any mortgage deed before the Act of 1929, and the mortgage deed in the present case is of 1923. In our opinion the plaintiff was deprived of the property in the house in Nayaganj in consequence of the wrongful act of the mortgagor. In the first place, the mortgagor committed a wrongful act when he purported to mortgage 6 sihams of this house and in fact he only had 3 sihams; in the second place, the mortgagor committed a wrongful act when by his default in not paying his simple money decree he allowed the property in the remaining 3 sihams to be sold by the auction. By these two actions the mortgagor caused loss to the plaintiff and gave the plaintiff a right to act under section 68 (b) or (c). As the plaintiff was deprived of part of his security and the mortgagor failed to secure the plaintiff possession thereof, we consider that section 68(c) will apply to a case where the plaintiff is deprived of the possession of the whole or part of the mortgaged property. Now section 68 lays down that in cases which arise under one or other of the sub-sections the mortgagee has a right to sue the mortgagor for the mortgage money. Such a suit will lie under section 67 for sale of the mortgaged property. This has been laid down by their Lordships of the Privy Council in *Lal Narsingh Partab v. Yaqub Khan* (1). We consider therefore that owing to the plaintiff being deprived of his share of the property in the house of Nayaganj, the plaintiff has under sections 67 and 68 of the Transfer of Property Act a right to sue for sale of the mortgaged property.

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The right to sell was also argued by learned counsel for the appellant on the ground of estoppel but not of *res judicata*. *Res judicata* does not arise because although it was found in a previous suit, No. 916 of 1930, between the defendant No. 4 who is the real contesting defendant in the case, on the one hand, and the plaintiff and the heirs of Bachnu, on the other, that the mortgage was a simple mortgage, still the fact remains that the particular Munsif who tried that suit was a Munsif whose pecuniary jurisdiction was not sufficient to comprise the present suit, and therefore technically the rule of *res judicata* would not apply. As regards estoppel, the fact is that in that suit Muhammad Ali alleged that the mortgage was a simple one whereas he now says that the mortgage was a usufructuary mortgage; the plaintiff on the other hand pleaded in that suit that the mortgage was a usufructuary mortgage and now he thinks that it was a simple one. We do not think that the parties can be tied down by any rule of estoppel. It is admitted that in precise terms the section of estoppel, 115 of the Indian Evidence Act, would not apply.

For respondents learned counsel alleged that the mortgage in suit has ceased to exist because under section 62 of the Contract Act it is provided: "If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed." Now it is doubtful how far this provision of the Contract Act will apply to cases of transfer of property. It is to be noted that in the mortgage deed of the 29th of March, 1927, by Bachnu in favour of the plaintiff it is merely provided that the amount of principal and interest due on the mortgage deed of the 17th of April, 1923, will be part of the consideration of the later deed along with further sums. It is not provided that the earlier deed is replaced by the later deed. What has happened in actual fact is that the later deed has been found invalid as regards the

house in Nayaganj, and the later deed has been replaced by two other deeds. Now the situation is that when the later deed was executed Bachnu had no right or title in the house in Nayaganj, having lost 3 sihams in the auction sale and 3 previously in 1924 and never having been entitled to the 3 sihams which was decided in the later litigation in 1931. It is doubtful, therefore, how far Bachnu's act could affect the perfectly valid mortgage of the previous date. So far as the 3 sihams of the house in Nayaganj which has passed by the auction sale to defendant No. 5 and eventually to defendant No. 4, the persons who should have executed any mortgage deed of that property were defendant No. 4 and defendant No. 5. Learned counsel however argues that it was open to Bachnu who had no title whatever in this house to affect the validity of his previous mortgage deed. In support of this argument learned counsel refers to a ruling in *Rajdhar v. Mohan* (1), where there was a previous mortgage bond and subsequently the plaintiff had a simple bond executed in lieu of it and the plaintiff himself made interpolation in that later bond and thereby rendered it invalid. The court held that it was not open to the plaintiff under such circumstances where he had by his own act deprived himself of the validity of the later bond in his favour to fall back on the earlier mortgage bond. We think that this ruling does not apply to the present case as it is in no way the fault of the plaintiff that the later documents are invalid in part. I consider that the ruling which we should follow is *Har Chandi Lal v. Sheoraj Singh* (2), where their Lordships of the Privy Council had a case as follows: In that case a Hindu mortgaged 5/6th share of a village which belonged to him, and his nephew mortgaged the remaining one-sixth which belonged to the nephew, to the same mortgagee. The widow of the Hindu mortgagor and his nephew thereafter jointly executed two mortgages of

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(1) (1930) 29 A.L.J. 223.

(2) (1916) I.L.R. 39 All. 178.

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the whole village for the amounts due under the old mortgages. Subsequently it was held that the widow had no right to mortgage. The mortgagee thereupon sued on the original mortgage by her husband of the 5/6th share. Their Lordships held that although the mortgagee's intention at the time of the later deed was to accept a new security in lieu of the old one, still as this was frustrated by the fact that the later deeds were held not binding on the widow it was contrary to equity and good conscience that the nephew's heirs who had succeeded her as reversioners of her husband should set up a later deed as a result of the mortgage effected by him and their Lordships held that the mortgagee could enforce the earlier deed against these heirs. I consider therefore that in the present case the plaintiff is entitled to sue on his earlier deed of the 17th of April, 1923, and that the later transactions which have been held invalid so far as the house in Nayaganj is concerned do not affect his right to sue on the earlier document. I may note that the contesting defendant is only interested in the house in Nayaganj.

For these reasons I would allow this second appeal with costs throughout.

ISMAIL, J.:—I agree.

VERMA, J.:—I agree.

BY THE COURT:—We allow this second appeal with costs throughout. We set aside the decrees of the two lower courts. We direct that the trial court shall re-admit this case to its file and dispose of any remaining issues according to law, the issues which concern the right of the plaintiff to a decree for sale having been decided by us, that is, we hold that in this case the plaintiff has a right to a decree for sale on his mortgage deed of the 17th of April, 1923. We allow the appellant costs in this Court and in the appellate court and in the trial court. The costs hereafter incurred will abide the result.