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per cent per annum; (2) Rs.3,568-6-0 at 15 per cent per annum simple from 19th February, 1920.

A fresh decree will be framed by this Court under the provisions of order XXXIV, rule 4, six months being allowed for payment by the defendants. Interest at the aforesaid rates will run until the date fixed for payment under this decree.

The plaintiffs shall get their costs from Udai Prakash alone. The contesting defendants shall get their costs in proportion to their success from the plaintiffs.

Before Mr. Justice Iqbal Ahmad and Mr. Justice Bajpai

RAMDIN SINGH (DEFENDANT) v. SARJU PRASAD
AND OTHERS (PLAINTIFFS)*

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May, 7

Immovable property—Interest of usufructuary mortgagee—Civil Procedure Code, section 68—Execution sale of usufructuary mortgagee's rights is to be held by the Collector.

The interest of a usufructuary mortgagee is immovable property, and so an execution sale thereof is rightly held by the Collector, under section 68 of the Civil Procedure Code, and not by the civil court.

Mr. Gopalji Mehrotra, for the appellant.

Mr. Damodar Das, for the respondents.

IQBAL AHMAD and BAJPAI, JJ.:—This is a defendant's appeal arising out of a suit for possession over certain *haqiats* and tenancy plots specified at the foot of the plaint and for Rs.200 on account of damages. The facts that culminated in the suit giving rise to the present appeal are undisputed and are as follows. The plaintiffs respondents held a simple money decree against one Har Narain Singh. Ramdin Singh defendant appellant also had obtained a simple money decree against Har Narain Singh. Har Narain Singh was mortgagee under certain usufructuary mortgage deeds and the *haqiats* and the tenancy plots in dispute in the

*Second Appeal No. 10 of 1937, from a decree of Mathura Prasad, Additional Civil Judge of Ballia, dated the 21st of August, 1936, confirming a decree of Muhammad Jalil, Munsif of Rasra, dated the 31st of October, 1935.

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present litigation were mortgaged with possession to Har Narain Singh. Both the plaintiffs respondents and the defendant appellant took out execution of their respective decrees and apart from other zamindari properties attached the mortgagee rights of Har Narain Singh under the five usufructuary mortgage deeds. The zamindari properties attached by the plaintiffs and the defendant were ancestral properties of Har Narain Singh and the execution was transferred to the Collector and the Collector fixed the 21st of October, 1929, for the sale of zamindari properties and the 22nd of October, 1929, for the sale of mortgagee rights. As there is no dispute in the present litigation with respect to the zamindari properties it is unnecessary to state anything about the sale of those properties. The mortgagee rights under the five usufructuary mortgage deeds were sold by the Collector and admittedly purchased by the plaintiffs respondents in execution of their decree on the 22nd of October, 1929.

Thereafter the same mortgagee rights were put to sale by the court at the instance of the defendant appellant on the 26th of January, 1930, and were purchased by the defendant appellant. It would thus appear that the purchase of the mortgagee rights by the defendant appellant was after the purchase of those rights by the plaintiffs at the auction sale held by the Collector.

Both the plaintiffs and the defendant applied for mutation in the revenue court and that court granted mutation in favour of the defendant appellant. The plaintiffs then filed the suit giving rise to the present appeal. The case put forward by the plaintiffs was that the mortgagee rights constituted immovable property and the civil court had therefore no jurisdiction to sell the same. On these allegations the plaintiffs maintained that by the purchase made by them on the 22nd of October, 1929, they became entitled to the mortgagee rights and that the sale by the civil court being without jurisdiction, the defendant acquired no

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right with respect to the mortgagee rights by his purchase of the 26th of January, 1930. This contention of the plaintiffs was accepted by both the courts below and those courts decreed the plaintiffs' claim for possession over the properties in suit in the capacity of mortgagees and for recovery of Rs.85 on account of damages.

The defendant has come up in appeal to this Court and it is contended on his behalf that the view taken by the courts below is erroneous. We are unable to agree with this contention of the defendant appellant.

The decision of the appeal depends on the determination of the question whether a mortgagee's interest in a usufructuary mortgage is an immovable property or movable property. If the mortgagee's interest under such a mortgage is immovable property, it is conceded that the decrees of the courts below are correct. The question was considered by a Division Bench of this Court in *Jang Bahadur v. Bhagatram Sheoprasad* (1) and it was held in that case that a mortgagee's interest in a usufructuary mortgage is an immovable property within the meaning of rule 89, order XXI, of the Civil Procedure Code. To the same effect are the decisions of the Calcutta and the Bombay High Courts. The Madras High Court has, however, taken the contrary view.

It is no doubt true that a transaction of usufructuary mortgage creates the relation of a debtor and creditor between the mortgagor and the mortgagee. It is, therefore, in one sense correct to say that when the interest of a usufructuary mortgagee is sold his rights as a creditor pass from him to the auction purchaser and the debt that is due to him stands transferred to the auction purchaser. After the auction purchase the mortgagor becomes indebted to the auction purchaser. In this limited sense the debt due to the judgment-debtor is sold and purchased by the auction purchaser. But the interest of a usufructuary mortgagee is not that of a

(1) (1929) I.L.R., 52 All. 232.

mere simple money creditor. By the mortgage an interest in immovable property is transferred to the mortgagee and by virtue of that transfer he is entitled to the possession of immovable property. The sale of the rights of a usufructuary mortgagee conveys to the auction purchaser the right to the possession of immovable property mortgaged. In other words, the sale is not only of the debt due to the mortgagee but also of his right to possession of immovable property. The property sold, viz. the mortgagee rights, is, therefore, immovable property. It follows that the plaintiffs acquired good title to the mortgagee rights by their auction purchase of the year 1929 and the sale in favour of the defendant appellant conveyed no right to him.

For the reasons given above we dismiss this appeal with costs.

*Before Sir John Thom, Chief Justice, and Mr. Justice
Ganga Nath*

BHOOP SINGH (DEFENDANT) *v.* SRI RAM (PLAINTIFF) AND
RAM CHARAN SINGH (DEFENDANT)*

1940
May, 8

Grove—Trees—Grove planted by sole zamindar—Execution sale of the zamindari—Trees of the grove pass by the sale along with the land—No grove-holder's rights are left with the zamindar.

Where a sole proprietor has planted a grove, the trees pass along with the land upon an execution sale of his zamindari.

Where there are more co-sharers than one, a co-sharer may have inferior rights as a grove-holder if he has planted any grove. But in the case of a sole proprietor he can not have inferior rights as a grove-holder as well as full proprietary rights as a zamindar in the land in which he has planted a grove. His rights in the groves or trees planted by him merge completely in his zamindari rights. The trees form part of the soil, and they pass with it.

Mr. *B. S. Darbari*, for the appellant.

Mr. *Sri Narain Sahai*, for the respondent.

*Second Appeal No. 1176 of 1937, from a decree of N. U. Alvi, Civil Judge of Aligarh, dated the 30th of January, 1937, confirming a decree of Ambika Prasad Srivastava, Munsif of Haveli, dated the 22nd of November, 1935.