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April 1.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

BAGHELIN (DEFENDANT) v. MATHURA PRASAD (PLAINTIFF).*

Mortgage—Lease of mortgaged property by mortgagee to mortgagor—Jurisdiction of Revenue Court—Remedies of mortgagee under mortgage—Act X of 1877 (Civil Procedure Code), s. 561—Time for filing objections—Holiday.

Where the time for filing objections under s. 561 of the Civil Procedure Code expired on a day when the Court was closed, and objections were filed on the day the Court re-opened, *held* that such objections were filed within time.

On the 16th March, 1874, *L.* gave *M* a mortgage on certain land for Rs. 24,000 for a term of ten years, by which it was provided, *inter alia*, that the mortgagee should take the profits of the land in lieu of interest; that the mortgagee should grant a lease of the land to the mortgagor, the latter paying the former the profits of the land every harvest in lieu of interest; that, if the mortgagor failed to pay the mortgagee the profits of the land by the end of any year, he should pay interest on the principal amount of the mortgage at the rate of one per cent. calculated from the date of the mortgage, and in such case the mortgagee should have no claim to the profits; and that, if the mortgagor failed to pay the mortgagee the profits by the end of any year, the mortgagee should be at liberty to cancel the lease and to enter on the land, and collect the rents thereof, and apply the same to payment of interest. On the 21st March, 1874, *M* gave *L* a lease of the land, under which Rs. 1,980 was the sum agreed to be payable annually as profits in lieu of interest. In 1879 *M*, who had not been paid any profits, sought to enforce in the Revenue Courts the condition as to entry on the land, but was successfully resisted by *L*'s widow.

On the 16th January, 1880, *M* sued *L*'s widow for interest on the principal amount of the mortgage at the rate of one per cent. calculated from the date of the mortgage to the date of suit, claiming the same by virtue of the provisions of the mortgage, on the ground that he had not been paid any profits.

Held that the mortgage and lease transactions must be regarded as one and indivisible and the questions at issue between the parties be dealt with *quâ* mortgagor and mortgagee; that, so regarding such transactions and dealing with such questions, *M* and *L* did not stand in the position of "landholder" and "tenant," and the proceedings of 1879 in the Revenue Courts were had without jurisdiction; also that, although, looking at the terms of the contract of mortgage, it was the intention of the parties that, on the mortgagor failing to pay the mortgagee the profits by the end of any year, the latter should in the first place seek possession of the land, yet as *M* had never obtained possession, but on the contrary had been resisted when he sought to obtain it, his present claim for interest was maintainable.

The Court directed that so much of the interest as was due at *L*'s death should be recoverable from such property of his as had come into his widow's hands; and as to the rest, which related to the period during which the widow had been in possession and in receipt of the profits, that it should be recoverable from her personally.

* First Appeal, No. 116 of 1880, from a decree of Mirza Abid Ali Beg, Subordinate Judge of Mainpuri, dated the 29th June, 1880.

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THE plaintiff in this suit claimed to recover interest on Rs. 24,000, from the 16th March, 1874, to the 15th January, 1880, at the rate of one rupee per cent. per mensem, from the defendant personally, and by the sale of a ten biswas share in a village called Asoli, an entire village called Gadhiya, and a thirteen biswas share of a village called Chintaman. He founded the suit on an instrument, dated the 16th March, 1874, executed in his favour by one Lalman Singh, the deceased husband of the defendant. This instrument, after reciting that Lalman Singh was indebted to the plaintiff in a sum of Rs. 23,000, and that he had borrowed a further sum of Rs. 1,000 from him, which made the whole sum due by him to the plaintiff Rs. 24,000, and that he had not the means to pay such debt, stated as follows:—“ I do therefore.....in consideration of the said sum mortgage for a term of ten years my zamindari property, that is to say, ten biswas of Asoli, the entire twenty biswas of Gadhiya, and thirteen biswas of Chintaman: I shall have mutation of names effected in the Revenue Court, and until mutation takes place the mortgagee shall have no claim against me for interest, nor shall I have any claim against him for profits: I have made over the profits of the mortgaged property to the mortgagee in lieu of interest: it has been further stipulated that a separate lease shall be granted to the mortgagor on condition that he shall continue to pay the profits on account of the lease to the mortgagee every harvest, and if the lease-money is not paid at the end of any year, I shall pay interest at one rupee per cent. per mensem on the whole mortgage-money from the date of the execution of this deed: in that case the mortgagee shall have no claim to the profits of the mortgaged property; he shall only be entitled to interest; and the money received from the lessee (mortgagor) shall be credited to the payment of interest: and if the money is not paid for a year, the mortgagee shall also have the power at the end of the year to set aside the lease and enter upon the mortgaged property himself, collect the rents thereof, and apply the same, after deducting village expenses, towards the payment of interest; should there be any deficiency in the amount of interest, I, the mortgagor, shall pay the same to the mortgagee at the end of the year with interest thereon at one rupee per cent. per mensem; on my failure to do so, the mortgagee shall be at liberty to realize the same in any way he may

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think best: whenever the lease is set aside, whether for failure to pay interest or for any other reason, I shall pay the mortgagee whatever may be due on account of Government revenue or interest; should I fail to do so, the mortgagee shall be at liberty to realize the same as he may think best, with interest at one rupee per cent. per mensem: if in the month of Jaith, within the stipulated period, the mortgagor pays off the money, redemption shall take place: if during the period the mortgagee holds possession of the property the gross rental diminishes or anything remains due from tenants, I shall make the same good when I pay the mortgage-money."

On the 21st March, 1874, the plaintiff gave Lalman Singh the lease of the mortgaged property referred to in the instrument of mortgage. This lease was for a term of ten years, and it provided that the mortgagor should pay the mortgagee Rs. 1,980 annually as profits; and that "should the lessee fail to pay the above at every season, he should pay the whole amount of the profits at the end of the year, and should he fail to pay at the end of any year, the lessors (mortgagees) should have power to cancel the lease."

On the 16th January, 1880, the plaintiff instituted the present suit against the widow of Lalman Singh. He alleged that Lalman Singh had not paid him the profits of the lease, nor had the defendant paid them; that he had dispossessed the defendant under the terms of the mortgage, but the Revenue Court had maintained her possession; and that the defendant represented that the lease was a nominal one, and interest had been paid regularly, and he had therefore become entitled to enforce the terms of the mortgage and to claim interest. He claimed interest on the principal amount of the mortgage, Rs. 24,000, from the 16th March, 1874, to the 15th January, 1880, at the rate of twelve per cent. per annum, asking for a decree against the defendant personally, and for the sale of the property. The defendant set up as a defence to the suit, *inter alia*, that the plaintiff could, under the terms of the mortgage, sue for possession of the property, but he could not sue for interest only. The Court of first instance held that the plaintiff was entitled to sue for interest, the agreement to pay him the profits of the property having been broken, and gave him a decree.

The defendant appealed to the High Court, contending, *inter alia*, that the plaintiff had no cause of action for the suit; that he was not entitled to sue for interest under the terms of the mortgage; and that the interest was not enforceable against the property, as the property was not hypothecated for its payment.

Mr. *Hill*, Munshi *Hanuman Prasad*, Lala *Lalta Prasad*, and Babu *Jogindro Nath Chaudhri*, for the appellant.

Pandits *Bishambhar Nath* and *Nand Lal*, for the respondent.

The judgment of the Court (STRAIGHT, J., and TYRRELL, J.) was delivered by

STRAIGHT, J.—This is an appeal from a decision of the Subordinate Judge of Mainpuri, passed upon the 29th June, 1880. On the 16th January, 1880, the plaintiff-respondent brought the present suit for recovery of Rs. 15,990, arrears of interest alleged to be due and owing from the defendant-appellant, for herself, and as widow and heiress of one Lalman Singh, deceased, mortgagor to the plaintiff, under a deed of mortgage, dated the 16th March, 1874, by sale of the property mortgaged. The defendant, in substance, pleaded that concurrently with such mortgage a lease of the mortgaged property was granted by the plaintiff mortgagee to her deceased husband, who was to receive and pay over the profits in lieu of interest; that after his death she succeeded him in possession of the property as lessee; that from 1874 the profits had been annually paid over, first, by Lalman Singh, and subsequently by the defendant, to the plaintiff, and that at the time of institution of the suit nothing was due; that the case should have been brought in the Revenue Court; that the plaintiff is not entitled to claim interest, but should have sued for possession. The Subordinate Judge decreed the claim to the extent of Rs. 14,905 against the defendant, the hypothecated property, and the estate left by Lalman Singh. The defendant appeals to this Court, the main contentions urged for her being (i) that the suit is badly framed and no cause of action is disclosed; under the terms of the mortgage-deed the plaintiff should have sued for possession and damages for being kept out of possession; (ii) that the interest is not enforceable against the property which was only mortgaged to cover the principal sum advanced; (iii) that even assuming the

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nit to be properly framed the recovery of a considerable portion of the amount decreed is barred by limitation. Objections were filed by the respondent under s. 561 of the Procedure Code against the Subordinate Judge's disallowance of the plaintiff's claim to the extent of Rs. 35, but it was urged by the appellant's counsel that they were put in too late and could not be entertained. We have looked into the matter and we find that the 21st December, 1880, was the date fixed for the hearing of the appeal, and the objections should accordingly have been filed not later than the 14th December preceding. But the Court was closed for the Muharram vacation from the 6th December to the 18th, both dates inclusive. The 19th being a Sunday, business did not commence till Monday the 20th, and we therefore think that the petition of objections was in time.

It is unnecessary to detail the facts at any length. It appears that in March, 1874, Lalman Singh, the defendant's deceased husband was indebted to Mathura Prasad in the sum of Rs. 23,000. He obtained the loan of a further sum of Rs. 1,000 in cash, and thereupon executed a mortgage for Rs. 24,000, in favour of his lender, of certain properties belonging to him, for a term of ten years. In lieu of the mortgagee taking possession, a lease was to be granted by him to the mortgagor for the term of ten years, and the mortgagor was to pay over the profits in satisfaction of the interest to the mortgagee. In accordance with this provision of the mortgage, a lease was executed on the 21st March, 1874, and Rs. 1,980 was the sum agreed to be annually paid as profits in lieu of interest. The plaintiff now asserts that such profits were never paid by Lalman Singh down to the date of his death, nor have they been by his widow since, and he estimates his claim to Rs. 15,955 on the basis of interest at the rate of one rupee per cent. on Rs. 24,000 from the 16th March, 1874, to the 15th January, 1880, pursuant to the following conditions of the mortgage-deed:—"I have made over the profits of the mortgaged property to the mortgagee in lieu of interest. It has further been stipulated that a separate lease will be granted to the mortgagor on condition that he shall continue to pay the profits on account of the lease to the mortgagee every harvest, and if the lease-money is not paid at the end of any year, I shall pay interest at one rupee per cent. per men-

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sem on the whole mortgage-money from the date of the execution of this deed. In that case the mortgagee shall have no claim to the profits of the mortgaged property : he will only be entitled to interest, and the money received from the lessee shall be credited to the payment of interest. And if the money is not paid for a year, the mortgagee shall also have the power at the end of the year to set aside the lease, and enter upon the mortgaged property himself, collect rents thereof and apply the same, after deducting the village expenses, towards the payment of interest. Should there be any deficiency in the amount of interest, I, the mortgagor, shall pay the same to the mortgagee at the end of the year with interest thereon at one rupee per cent. per mensem. On my failure to do so, the mortgagee will be at liberty to realize the same in the way he thinks best." The plaintiff asserts that he dispossessed the defendant under the above condition as to entry into the mortgaged property, on default in payment of the profits as stipulated, and there is a petition on the record filed by him on the 5th September, 1879, in the Court of the Collector, declaring that he has cancelled the lease and taken the property under "his direct management," and praying that receipts for the revenue shortly to be collected may not be given without his (the plaintiff's) signature, and that the tenants be instructed to pay the revenue without demur. Subsequently, on the 9th September, 1879, the Deputy Collector passed an order as prayed on the petition, and later on, the 20th October, directed the ejection of the defendant, telling her, if she had any objection to offer to her ejection, she must assert it by a regular suit. This decision of the Deputy Collector was appealed to the Collector on the 10th November, 1879, and an order was passed by him maintaining the possession of the defendant under the lease.

Looking at these facts, we think it abundantly clear that, when the plaintiff sought to enforce the second condition of his mortgage by cancelment of the lease and entry upon the property mortgaged, he was obstructed by the defendant, and the question then arises, whether this conduct upon her part affords the plaintiff a cause of action in respect of the earlier condition as to the payment of interest, and entitles him to bring the present suit. We think that the mortgage and lease transactions must be regarded as one and indi-

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visible, and that the mere use of the term lease in reference to the mortgagor does not alter his real character or qualify the proprietary rights that continued in him. In fact, in dealing with the questions raised in the case, they can only be decided *quod* mortgagor and mortgagee. That there was no charge on the land for the interest, we are quite clear, and the contrary view of the Subordinate Judge in this respect cannot be sustained. The transaction between the parties appears to have been primarily one of simple mortgage, the mortgagor continuing in possession and paying over the profits in lieu of interest, with the proviso that, if the profits remained unpaid for one year, the mortgagee might enter upon the property mortgaged, and realize them himself. The other alternative was given him of recovering interest from the mortgagor on the whole sum advanced from the date of the mortgage at the rate of one per cent. Under these circumstances it seems to us that the plaintiff and Lalman Singh did not stand in the position of "landholder" and "tenant" within the meaning of Act XVIII. of 1873, and that the plaintiff's application to the Revenue Court in September, 1879, was accordingly a useless and abortive proceeding, as made to a tribunal that had no jurisdiction to entertain it. Now it seems to us evident from the terms of the contract of the 16th March, 1874, that it was the intention of the parties that, on default being made for one year by the mortgagor in paying over the amount of profits agreed upon, possession of the mortgaged property should be primarily sought by the mortgagee. In other words, he was to assume the position of an ordinary usufructuary mortgagee in possession, entitled to satisfy his interest from the income of the property. It is odd, to say the least of it, that though Lalman Singh had failed to pay over the profits as fixed from the very outset, no effort should have been made by the plaintiff to enforce the condition of his mortgage as to cancellation of the lease and obtaining possession until as late as 1879, and that then he should have gone into the wrong Court. The fact, however, remains, that he never did have possession: on the contrary he has, by the action of the defendant, been prevented from getting it, nor has he been paid any portion of the profits as agreed either by Lalman Singh or the defendant. Under such circumstances we are not prepared to say that there is no cause of action for the present suit,

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or that the plaintiff is debarred from reverting to the condition in the mortgage contract as to the payment of increased interest, and from bringing a suit in the present shape to recover it. Looking at the matter broadly, we think the equitable order to pass will be to sustain the finding of the Subordinate Judge as to the amount of interest due, and to direct that so much of it as had accrued and was owing at the date of Lalman Singh's death shall be realized from such property of his as has come to the hands of the defendant. With regard to the residue, which relates to the period during which the defendant herself has been in possession of the mortgaged property and in receipt of the profits, that will be decreed against her personally. In either case interest will be allowed at the rate of 12 per cent. from the date of the institution of the suit to realization. The respective amounts due from the defendant, as in possession of her husband's estate, and personally, will be determined in the execution department. To the extent we have indicated, the appeal will be decreed, the objections of the respondent disallowed, and the decision of the Subordinate Judge modified. Having regard to the delay on the part of the plaintiff to enforce the conditions of the mortgage in respect of interest, and the defendant's dishonest plea of payment, which we agree with the Subordinate Judge she has wholly failed to establish, we order that the parties pay their own costs in each Court.

Decree modified.

ORIGINAL CIVIL.

Before Mr. Justice Straight.

HARRISON AND ANOTHER (PLAINTIFFS) v. THE DELHI AND LONDON BANK
AND ANOTHER (DEPENDANTS).*

 1882
 April 20.

Partnership—Winding-up—Account—Suit for dissolution—Transfer of suit—Act IX of 1872 (Contract Act), s. 265—Act X of 1877 (Civil Procedure Code), ss. 25, 215—Parties to suit—Act XV of 1877 (Limitation Act), sch. ii, Nos. 106, 120—Power of partner to mortgage partnership land—Power of partner to borrow money.

T, B, R, and W, the owners of a certain estate in equal shares, in 1863 entered into a partnership for "the cultivation of tea and other products" upon such estate. In 1864 H, E, and I, joined the firm. In 1870 H died; and in 1871 T purchased his share and those of E and I, and in 1873 of R. In 1875 T gave the Delhi and

* Original Suit No. 1 of 1881.