

pondent Darbo is indigent and dependent, and under the provision in question has the better claim."

1882

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DANNO  
v.  
DARBO.

In second appeal the plaintiff Danno contended that the terms "enriched" and "unprovided," as used in the Mitakshara, meant "enriched" and "unprovided" for by the father, and as no property had been given to her by her father she was entitled to share in the property left by him with the defendant her sister.

Babu *Sital Prasad Chattarji*, for the appellant.

Munshi *Hanuman Prasad* and Pandit *Nand Lal*, for the respondents.

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

STRAIGHT, J.—The suit was in reality a contest between Danno the plaintiff and Darbo the respondent for possession of the estate left by their father Anta. It has been found as a fact by both the lower Courts that Darbo is in poor circumstances, whereas Danno is well off and possessed of property. The question then arises, is the provision of v. 13 of s. xi, ch. ii of the Mitakshara applicable to the case. We think it is, and that the expression "unprovided for," in contradistinction to the term "enriched," must be construed in the sense of "indigent," as opposed to "possessed of means," irrespective of the sources of provision or non-provision. The appeal is dismissed with costs.

*Appeal dismissed.*

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*Before Mr. Justice Straight and Mr. Justice Tyrrell.*

MAHESH SINGH AND OTHERS (PLAINTIFFS) v. CHAUHARJA SINGH  
(DEFENDANT).\*

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1882  
February 3.

*Mortgage—Usufructuary mortgage—Failure of claim to enforce lien—Compensation for breach of contract to give mortgagee possession.*

A usufructuary mortgagee, the mortgagor having broken his agreement to give him possession of the mortgaged property, sued the mortgagor to recover the principal mortgage-money and interest by enforcement of lien. The property was not hypothecated as security for the mortgage-money. *Held* that it was inequitable to dismiss the suit for that reason, the defendant having been guilty of a breach of the contract of mortgage, for which the plaintiff was entitled to compensation;

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\*Second Appeal, No. 772 of 1881, from a decree of M. S. Howell, Judge of Jaunpur, dated the 1st April, 1881, reversing a decree of Pandit Soti Behari Lal, Munsif of Jaunpur, dated the 6th July, 1880.

1882

MAHESH  
SINGH  
v.  
CHAUHARJA  
SINGH.

that, although the plaintiff did not expressly claim such relief, yet, regard being had to the pleadings and evidence in the case, the suit might be treated as one for such relief; and that in estimating the compensation which should be awarded, the principal mortgage-money with interest at the rate specified in the contract of mortgage might fairly be taken as a reasonable guide.

CHAUHARJA SINGH, one of the defendants in this suit, on the 11th May, 1874, gave the plaintiffs a usufructuary mortgage on certain land for Rs. 400. By the instrument of mortgage it was agreed that possession of the mortgaged property should be given to the plaintiffs, and that out of the annual profits thereof Rs. 48, representing interest on the principal mortgage-money at the rate of Re. 1 per cent., should be appropriated by them, and the balance, after payment of Government revenue and other expenses, be credited to the principal mortgage-money. On the 2nd April, 1880, the plaintiffs brought the present suit against Chauharja Singh, and against certain persons in possession of the mortgaged property, in which they claimed to recover Rs. 400, the principal mortgage-money, and Rs. 282-8-0 interest thereon from the 11th May, 1874, to the 31st March, 1880, at the rate of Re. 1 per cent., by enforcement of their lien on the mortgaged property. They alleged that the defendant Chauharja Singh had failed to put them in possession of the mortgaged property, and had not paid them the principal mortgage-money or interest; and that "the cause of action in respect of the principal amount accrued on the 11th May, 1874, and the amount of interest claimed became payable every year." The Court of first instance gave the plaintiffs a decree as claimed. On appeal by the defendant Chauharja Singh the lower appellate Court dismissed the suit on the ground that the instrument of mortgage did not contain an hypothecation of the mortgaged property as security for the mortgage-money, and the claim was therefore not maintainable.

In second appeal the plaintiffs contended that they were equitably entitled to a decree against Chauharja Singh for the mortgage-money and interest.

Munshis *Hanuman Prasad* and *Kashi Prasad*, for the appellants.

The *Senior Government Pleader* (*Lala Juala Prasad*), for the respondent.

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

1872

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MAHESH  
SINGH  
v.  
CHAUHARJA  
SINGH.

STRAIGHT, J.—On the 11th May, 1874, Chauharja Singh, defendant-respondent, executed a usufructuary mortgage of certain shares to the plaintiffs-appellants for Rs. 400, and the instrument was duly registered on the 20th May following. By the mortgage it was agreed that the mortgagees should take possession of the shares hypothecated, and out of the income received therefrom appropriate Rs. 48 for interest, carrying the balance after payment of revenue and other expenses to the credit of the principal sum. The plaintiffs-appellants now bring their suit upon the allegation that the defendant-respondent never has given them possession, and they seek to recover Rs. 400 principal with Rs. 282-8-0 interest, by enforcement of lien against the ten annas share mortgaged. Certain other persons in possession of the property have been impleaded as defendants under s. 32 of the Procedure Code. The plaintiffs allege their cause of action to have accrued on the 11th May, 1874, and their claim is for Rs. 400 principal, and Rs. 282-8-0 interest from that date to the 31st March, 1880.

The Munsif decreed the claim in its entirety; but the Judge in appeal reversed this decision, holding that, as there was no hypothecation of the land mentioned in the mortgage-deed, the suit was unmaintainable. The plaintiffs mortgagees now appeal to this Court.

We concur with the Judge's view that there was no pledge of the shares, and that the plaintiffs-appellants are not entitled to ask for enforcement of lien. The defendants 2, 3, 4 and 5 have accordingly been exempted. But we think it inequitable to hold that the plaintiffs must therefore fail entirely in the present suit. The defendant has had the use of the plaintiffs' money ever since the execution of the mortgage, and has paid neither principal nor interest. By his tortious act in failing to give the mortgagees possession of the mortgaged land, he has been guilty of a breach of a contract in writing registered, for which the plaintiffs are entitled to compensation. It is true that the relief prayed in the plaint is not precisely asked in this form, but in treating the suit as one for damages, we can determine it upon a cause of action disclosed on

1882

MAHESH  
SINGH  
v.  
CHAUHARJA  
SINGH.

the face of the pleadings, and in accordance with the evidence given in the case. In estimating the measure of damages to be decreed, we think we may fairly take the principal sum with interest at the rate specified in the contract as a reasonable guide. We accordingly decree the appeal as regards Chanharja Singh with costs, and decree the plaintiffs' claim for Rs. 628-8-0 against him.

*Decree modified.*

1880  
January 26.

## FULL BENCH.

*Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Oldfield, and Mr. Justice Straight.*

DEO KISHEN AND ANOTHER (DEFENDANTS) v. MAHESHAH SAHAI AND OTHERS (PLAINTIFFS).\*

*Act X of 1877 (Civil Procedure Code), s. 561—Time for filing objections.*

The notice of objections referred to in s. 561 of the Civil Procedure Code must be filed not less than seven days before the date fixed for the hearing in the summonses issued to the parties.

THIS was a reference to the Full Bench by Pearson, J., and Oldfield, J., of the following question arising in this appeal:—

“Whether the law requires that the notice of objections referred to in s. 561 of the Civil Procedure Code shall be filed not less than seven days before the date fixed for the hearing in the summonses issued to the parties, or seven days before the date on which the first hearing of the case actually comes on?”

*Mir Zalur Husain*, for the appellants.

*Munshi Hanuman Prasad* and *Pandits Bishambhar Nath* and *Nand Lal*, for the respondents.

The following judgment was delivered by the Full Bench:—

PEARSON, J. (STUART, C. J., OLDFIELD, J., and STRAIGHT, J., concurring).—The day fixed for the hearing of an appeal is that fixed under s. 552 of Act X of 1877 and that alone. The hearing of the appeal may be adjourned to another day, but the latter is not, in the language of the law, the day fixed for the hearing of the appeal, which is only the day originally fixed for that purpose. In ss. 555,

\* First Appeal, No. 104 of 1879, from a decree of Mirzu Abid Ali Beg, Subordinate Judge of Mainpuri, dated the 30th June, 1879.