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APPELLATE CIVIL.

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

BASANT LAL AND ANOTHER (PLAINTIFFS) *v.* TAPESHRI RAI (DEFENDANT)*

Registration—Act VIII. of 1871 (*Registration Act*), *ss.* 17, 18.

N agreed by an instrument in writing called a "*sattah*," in consideration of a loan of Rs. 99-8-0, that *B* should have the right of cultivating indigo on certain land from a certain date for a certain period; that if she failed to make over to him any portion of such land, or interfered with his cultivation of any portion of it, she should be responsible in damages for the loss occasioned to *B* in respect of such default or interference at the rate of Rs. 40 per bigha, and for the repayment of such loan; "that, if she failed to pay, *B* was at liberty to recover from her person and property; and that, until the conditions of the agreement were fulfilled, she hypothecated her four-anna share in mauza *B*." *B* sued *N* upon the "*sattah*" to recover Rs. 1,059-6-0, being the amount of such loan and damages, by the sale of such four-anna share, such suit being founded on a breach of the agreement. *Held per* STUART, C. J., that, inasmuch as the value relating to the immoveable property hypothecated in the "*sattah*" was simply Rs. 99-8-0, without any stipulation as to interest or any other payment by which that sum might be augmented, the damages stipulated for depending upon a contingency which might or might not happen, and respecting which nothing could be anticipated at the time of registration, the instrument did not, under Act VIII. of 1871, s. 17, require registration. *Darshan Singh* v. *Hanwanta* (1) observed on.

Per OLDFIELD, J.—That, the only certain sum secured by the "*sattah*" being Rs. 99-8-0, the instrument did not require registration under that Act, but it could not be used to enforce a lien to any greater extent than Rs. 99-8-0 against the property in suit.

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*ond Appeal, No. 474 of 1879, from a decree of H. D. Willock, Esq., Judge h, dated the 16th January, 1879, modifying a decree of Rai Bhagwan Prasad, Subordinate Judge of Azamgarh, dated the 14th September, 1878,

(1) I. L. R., 1 All., 274,

1880

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THE plaintiffs in this suit claimed to recover from the defendants, Najib-un-nissa Bibi and Muhammad Ahia, Rs. 1,059-6-0, being moneys advanced to those defendants, and damages, in virtue of an instrument executed by those defendants in the favor of the plaintiffs called a "*sattah.*" The plaintiffs claimed to recover such moneys from those defendants personally, and by the sale of a four-anna share in a village called Bhurra Makbulpur, belonging to those defendants, which was alleged to be hypothecated in the "*sattah*" as security for the payment of such moneys. The plaintiffs also claimed that certain alienations by sale of such share made subsequently to the date of the "*sattah,*" one of such alienations having been made to the defendant Tapeshri Rai, might be "cancelled." The terms of the "*sattah*" will be found fully stated in the judgments of the High Court. The defendant Tapeshri Rai set up as a defence to the suit, *inter alia*, that the "*sattah*" required to be registered, and being unregistered could not affect the four-anna share in Bhurra Makbulpur or be received as evidence of its hypothecation to the plaintiffs. The Court of first instance held that the "*sattah*" did not require registration; and eventually gave the plaintiffs a decree for the sum claimed against Najib-un-nissa Bibi and Muhammad Ahia, directing that the money might be realized by the sale of the four-anna share in Bhurra Makbulpur. On appeal by the defendant Tapeshri Rai the lower appellate Court held that the "*sattah*" required to be registered, and not being registered could not affect the four-anna share or be received as evidence of its hypothecation to the plaintiff, and modified the decree of the Court of first instance, in so far as it directed the sale of the share. The plaintiffs appealed to the High Court.

Mr. *Spankie* (with him Babu *Oprokash Chandar Mukarji*), for the appellants, contended that the "*sattah*" did not require registration, as it did not certainly secure Rs. 100. He referred to *Ahmad Bakhsh* v. *Gobindi* (1); *Karan Singh* v. *Ram Lal* (2); *Rajpati Singh* v. *Ram Sukhi Kuar* (3); and *Darshan Singh* v. *Hanwanta* (4).

Mr. *Conlan*, Munshi *Hanuman Prasad*, and Mir *Akbar Husain*, for the respondent.

(1) I. L. R., 2 All., 216.
(2) I. L. R., 2 All., 96.
(3) I. L. R., 2 All., 40.
(4) I. L. R., 1 All., 274.

The following judgments were delivered by the Court:

STUART, C. J.—The two principal questions raised in this appeal are (i) what is the nature of the instrument on which the plaintiffs sue to recover? and (ii) does it require registration in order to be received in evidence and enforced against the property mentioned in it?

The instrument is as follows:—I, Najib-un-nissa Bibi, &c., do hereby declare that I, the executant, being in need of meeting my own necessity, have, on a promise to give land for sowing indigo in 1284 fasli, borrowed Rs. 99-8-0, as a *zar-i-peshgi* advance, from Babu Basant Lal and Babu Ganga Prasad Singh, proprietors of the godown at Bisauli in pargana Nizamabad: that I promise and write that I shall get first class sugar-cane and barley producing 24 bighas of land in mauza Bhurra Makbulpur, pargana Nizamabad, as selected by the karindas of the said godown, measured by the large chain consisting of three Ilahi yards, *i. e.*, 20 biswas, according to Mr. Duncan's pole or *latha* as used at the said godown, at the end of the month of Chait 1283 fasli: that the said agents of the godown are to irrigate the land mentioned above from pucka and kucha wells, canal, lake, and ponds, in any way they think proper, and raise indigo: that they are to lay out their own money for the purpose of beating up the indigo leaves, at the time of beating up: that after setting off the rent of the said land at Rs. 4 per bigha together with the patwâri's charges against the *zar-i-peshgi*, both principal and interest, whatever surplus will be found due to me I shall recover from the proprietors of the said godown: that the proprietors of the said godown are to relinquish the land sown with indigo at the end of Bhadon, 1284 fasli, after cutting the indigo stumps: that we shall then settle the land used for planting indigo with any tenant we like: that if we (God forbid) fail to give the whole land, or interfere with the sowing of indigo seed or irrigation thereof, or should any one else interfere or turn up the indigo (seed), the proprietors of the godown shall have the power to recover damages for loss, according to the practice of the godown, at Rs. 40 per bigha (regarding the deficiency in the quantity of land or on account of the land in respect of which over turning or ejection may take place or irriga-

1880

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tion be interrupted) together with the principal *zar-i-peshgi* amount, from me, the executant: that if I fail to pay, the proprietors of the godown are at liberty to recover from my person and property: that until the fulfilment of the conditions of the agreement we hypothecate our four-anna right and property in manza Bhurra Makbulpur, agreeing not to transfer it in any way, and that should we do so, it would be void."

I am clearly of opinion that this instrument is not a mere lease but an instrument in the nature of a usufructuary mortgage. For let us observe its terms. On the recital that Najib-un-nissa Bibi, the party making it, for herself and her minor sons and daughters, was "in need of meeting my own necessity," it stipulates that she shall receive a *zar-i-peshgi* advance of Rs. 99-8-0 from the parties in whose favor the instrument is granted, and in consideration of that advance she promises to lease to the plaintiffs 24 bighas of land at a rent of Rs. 4 per bigha for a period commencing from Chait 1283 to Bhadon 1284 (*i.e.*, for about 17 months), the land to be selected by the defendant; and it goes on to provide "that the proprietors of the godown are to relinquish the land sown with indigo crop at the end of Bhadon 1284 fasli, after cutting the indigo stumps, that we shall then settle the land used for planting indigo with any tenant we like," and that should she fail in performance of her part of the contract she should pay damages at the rate of Rs. 40 per bigha together with the *zar-i-peshgi* advance, and if she should fail to pay these damages and the advance, the parties with whom she contracts should be at liberty to recover from her person and property; and it then expressly provides "that until the fulfilment of the conditions of the agreement, we hypothecate our four-anna right and property in mauza Bhurra Makbulpur, agreeing not to transfer it in any way, and that should we do so, it would be void." Such an instrument is, in my opinion, essentially a usufructuary mortgage, and I observe that Mr. Macpherson in his work on the Law of Mortgages in Bengal and the North-Western Provinces, 5th ed. p. 8, so describes it. He there says: "*Zar-i-peshgi* leases, or leases granted on a sum of money being advanced, are on the same footing as pure usufructuary mortgages, and are dealt with as such;" and in support of this opinion he refers to numerous

authorities; and the learned author adds: "but this is only when there is a power of redemption reserved to the lessor either expressly or impliedly." In the present case we have not only an express hypothecation and for a distinct term, but the power to redeem is clearly implied, not only from that term itself, but from the proviso "that the proprietors of the godown are to relinquish the land together with indigo crop at the end of Bhadon 1284 fasli, after cutting the indigo stumps, that we shall then settle the land used for planting indigo with any tenant we like."

Being then an instrument of this nature the next question is, whether it requires registration in order to be put in force against the property hypothecated by it? I am clearly of opinion that it does not require registration. The registration law to be considered in such a case is that provided by Act VIII. of 1871, and the document in the present case clearly falls within the instruments mentioned in sub-section 1 of s. 18 of that Act as an instrument of value less than Rs. 100 in respect of immoveable property. It was suggested at the hearing that the question of the registration of such an instrument as this came within the principle of several rulings of this Court by which it appears to have been held that, in estimating the value to be considered in such cases, the interest agreed to be paid should be taken into account, and a judgment of my own, sitting with Turner, J., was referred to as showing this.—*Darshan Singh* v. *Hanwanta* (1). In that case the bond which was unregistered was for a sum of Rs. 99 together with interest at 2 per cent. per mensem, and for that debt the defendants hypothecated certain property. In our judgment, which was delivered by Turner, J., and concurred in by me, it is stated that the bond "secured the repayment of Rs. 99 *plus* Rs. 6 the interest for three months. This was the least sum that could have been recovered under the instrument. The instrument not having been registered, we cannot act upon it." I have again looked at the bond in that case, and I observe it stipulates for the repayment of the Rs. 99 with interest thereon at the rate of two per cent, "payment to be made in Sambat 1928." It would appear to have been considered by us that this absolutely and beyond the control

(1) I. L. R., 1 All., 274.

1880

ANT LAL v. PESHRI RAI.

of the parties postponed payment till that date, and if so undoubtedly the amount was over Rs. 100 and the bond required registration, and our judgment does not fall within the rulings of this Court to which I have referred. It may possibly be that we were mistaken in reading the bond as we did, and that the condition as to payment in Jaith, Sambat 1928, was introduced merely for the convenience of the lender of the money who might then demand it, but possibly there was nothing to prevent the borrower paying up the Rs. 99, if he had the money, almost immediately or very soon after the execution of the bond, so as to make the debt less than Rs. 100, and that would have been the true value for the purposes of registration. But I suppose all that was considered at the time of our judgment, and that we were well advised as to the facts when we stated that Rs. 99 *plus* Rs. 6 for interest "was the least sum that could have been recovered under the instrument." But if it were otherwise and the bond simply acknowledged a debt of Rs. 99 which could have been repaid with interest, no matter how soon, then I am inclined to think our judgment was wrong and that the only certain criterion of value for registration is the principal sum. In the present case our attention was directed to rulings of certain of the other High Courts laying down this principle, and particularly one by the High Court of Bombay (1), where it was decided that for the purpose of registration the principal sum alone was to be looked at. It appears unnecessary to consider such conflicting rulings in the present case, although I may remark that I have received a very strong impression that the Bombay Court are right and our course of decision to the contrary has been mistaken, and so soon as the question is again raised here I hope it may be referred to the Full Bench for serious and deliberate consideration. In the present case, however, we need not occupy ourselves with any such discussion, as the value relating to the immoveable property is simply Rs. 99-8-0 without any stipulation as to interest or any other payment by which the principal sum may be augmented; the damages stipulated for depending on a contingency which may or may not happen and respecting which nothing can be anticipated at the time of registration. The decree of the lower appellate Court must therefore be modified so as to

(1) *Nanabin Lakshman* v. *Anant Babaji*, I. L. R., 2 Bom., 353.

1880

BASANT I v. TAPESI RAI.

allow the plaintiff to recover the Rs. 99-8-0 from the hypothecated property, the decree of the lower appellate Court in other respects remaining good.

OLDFIELD, J.—It appears that Najib-un-nissa Bibi for self and as guardian of her minor children executed a deed called a "*sattah*," dated 15th March, 1876, in favor of the plaintiffs, by which she covenanted to lease to them certain lands, and she at the same time hypothecated to them by the said "*sattah*" a four-anna share in mauza Bhurra Makbulpur for the repayment of a sum of Rs. 99-8-0, advanced to her as a loan, and for damages payable by her in the event of her failure to fulfil the conditions of the contract. A 5½ annas share including the hypothecated four annas share was subsequently sold by one of the sons to Tapeshri Rai and Mahesh Rai and Ram Lal, the two latter being represented in this suit by Kunjan Singh. Tapeshri Rai bought 3½ annas and obtained a mortgage on the remaining 2 annas share and the others bought a 2 annas share. The plaintiffs now bring this suit against the vendors, purchasers, and mortgagee, to recover Rs. 1,059-6-0 by sale of the hypothecated four annas share, the sum they claim being the sum they advanced and the damages to which the vendors became liable for failure to fulfil the terms of the *sattah*, and for which amount the share was hypothecated, and they base their claim on the *sattah*. The plaintiffs and executants of the *sattah* entered into a compromise; Kunjan Singh defendant-purchaser confessed judgment; and Tapeshri Rai, who it will be seen is interested in the whole four annas share hypothecated in the *sattah*, as out of 5½ annas which belonged to the executants he purchased 3½ and holds a mortgage on the remaining 2 annas, disputed the claim on the ground, *inter alia*, that the claim to enforce the hypothecation of four annas under the *sattah* necessarily failed, inasmuch as that instrument should have been registered, as it created a lien over the property for more than Rs. 100, and being unregistered was inadmissible in evidence. The first Court decreed the claim, exempting two of the children of Najib-un-nissa. Tapeshri Rai appealed to the Judge and raised the same objection as to the registration, and the Judge held that the objection was valid, and he set aside so much of the

1880

ANT LAL v. PESHRI RAI.

decree as enforced the hypothecation under the *sattah* against the property.

The plaintiffs have preferred a second appeal making Tapeshri Rai alone respondent, and they urge that the instrument does not require registration as it does not create any interest in immoveable property of the value of Rs. 100 and upwards, and further that the Judge could not modify the decree in respect of defendants who did not appeal; and there is an objection as to costs.

Looking at the instrument in question, which is called a "*sattah*," I find that by its first clauses the executant declares that she has taken a loan of Rs. 99-8-0 from plaintiffs on the promise that she shall lease the land for farming indigo for the season of 1284 fasli, and she covenants to have measured, and to put plaintiffs in possession, in Chait 1283 fasli, of 24 bighas of land to be selected by the plaintiffs' agent, to be held by them on lease from Chait 1283 to Bhadon 1284 at a rent of Rs. 4 per bigha, and it is stipulated she shall receive the surplus rent after deducting the amount of the loan with interest.

The executant binds herself to pay the plaintiffs damages at a certain sum per bigha for loss sustained by failure on her part to fulfil the conditions of the agreement, and she hypothecates a four anna share in mauza Bhurra Makbulpur as security for the repayment of the sum advanced and the damages she may become liable for.

I am unable to put quite the same construction on this document that the Chief Justice does. The first portion of the instrument appears to me to be a simple lease or agreement to lease and not to be a "*zar-i-peshgi*" lease, or lease granted on a sum of money being advanced of the nature of a usufructuary mortgage. It is true that such leases often are on the same footing as pure usufructuary mortgages, but it will be seen from Macpherson on Mortgages, 5th ed. p. 9, that "this is only when there is a power of redemption reserved to the lessor either expressly or impliedly, so that it distinctly appears that the parties themselves in fact intended the transaction to be one in the nature of a mortgage."

1880

BASANT v. TAPES RAI.

I find no such indication here. The land was leased for a fixed period at the end of which the lease terminated: provision was made for the recovery of the whole advance out of the rent payable to the lessor by the lessee and the land was in no way mortgaged as security for the repayment of the sum advanced. I am not called on, looking to the pleadings, to say whether this instrument should have been registered as a lease.

The last portion of the instrument, however, undoubtedly effects an hypothecation of a four annas share of the mauza, and the only question which is raised in this appeal for our decision under the Registration Law is whether this portion of the instrument creates a mortgage to the value of Rs. 100 and registration was in consequence compulsory under s. 17 of the Act of 1871. I think not: for the only certain sum secured by the hypothecation is Rs. 99-8-0, and the instrument cannot be held in the terms of the law to purport or operate to create any right, title, or interest of greater value than that sum.

The particular objection taken to the inadmissibility of the instrument in evidence with which we have to deal fails, and so far the first ground of appeal is valid, but the instrument cannot be used to enforce a lien to any greater extent than Rs. 99-8-0 against the property in suit.

Before Mr. Justice Pearson and Mr. Justice Straight.

1880
June 1

KHATUN BIBI (PLAINTIFF) *v.* ABDULLAH (DEFENDANT).*

Principal and Surety—Discharge of Surety by variance in terms of Contract—Act IX. of 1872 *(Contract Act), s.* 133.

A *kabuliyat* whereby a lessee agrees, without the consent of the person guaranteeing the payment of the rent agreed to be paid under a former *kabuliyat*, that he will pay rent at a higher rate than that agreed to be paid in such former *kabuliyat*, amounts to a variance of the terms of the contract of guarantee and discharges the lessee's surety in respect of arrears of rent accruing subsequent to such variance.

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* Second Appeal, No. 1321 of 1879, from a decree of Maulvi Mahmud Bakhsh, Additional Subordinate Judge of Ghâzipur, dated the 8th September, 1879, reversing a decree of Munshi Kulwant Prasad, Munsif of Rasra, dated the 13th May, 1879.