

caste they may belong must be the same. I am, therefore, of opinion that legal cruelty has been established in the present case, and that apart from that taking all the circumstances into consideration I would not be justified in passing a decree for restitution of conjugal rights in favour of the plaintiff-respondent.

The appeal is, therefore, allowed, the decree of the learned Subordinate Judge is set aside, and that of the learned Munsif restored with costs in all the three courts.

Appeal allowed.

PRIVY COUNCIL.

LAL NARSINGH PARTAB (PLAINTIFF) *v.* YAQUB KHAN
AND OTHERS (DEFENDANTS).*

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Misra, J.

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March, 15.

(On Appeal from the Chief Court of Oudh.)

Mortgage—Construction of mortgage—Mixed, simple and usufructuary mortgage—Mortgagor failing to give possession—Remedy of mortgagee—Transfer of Property Act (IV of 1882), sections 67, 68 and 98.

A mortgage executed in 1923 to secure an advance of Rs. 30,000 and interest stated by clause 2 that a half share in certain villages had been hypothecated in lieu of the principal and interest, and that in order to pay the interest possession had been delivered to the mortgagee; clause 3 provided that the principal was to be repaid within 35 years; clause 4 that the mortgagors should remain entitled to eject tenants, to enhance rents, to cultivate the land and to issue leases, and that if there should be a surplus after paying the interest it should be applied to paying the principal; clause 5 that if at the appointed time the mortgagors should not repay, the mortgagees should have power to realize the sum due by sale; clause 7 that if the mortgagees were deprived of possession then the liability should rest with the mortgagors. The Rs. 30,000 was duly advanced but the mortgagors failed to

*Present.—Lord SHAW, Lord TOMLIN and Sir LANCELOT SANDERSON.

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deliver possession of the mortgaged property. In 1924 the mortgagee sued to realize the sum due by sale, or for a money decree.

Held that the mortgage, upon its true construction, was not an anomalous mortgage to which section 98 of the Transfer of Property Act, 1882, applied, but was a mixed simple and usufructuary mortgage; that the money owing had become payable by section 68(c) by reason of the failure to give possession and that consequently the mortgagee had a right under section 67 to a decree for sale.

Decree of the Chief Court varied.

APPEAL (No. 112 of 1927) from a decree of the Chief Court of Oudh (October 12, 1926) varying a decree of the Subordinate Judge of Rae Bareilly.

The appellant brought a suit to enforce a mortgage of April 8, 1923, by sale of the mortgage property, or for a money-decree for the amount owing. The Subordinate Judge made a decree for the payment of the mortgage-money by sale in the usual form. He held that the mortgage in question was a combination of a simple mortgage and an usufructuary mortgage so that it was governed by section 68 of the Transfer of Property Act (IV of 1882). The Chief Court differing from the Subordinate Judge, held that the mortgage was an anomalous mortgage governed by its own terms by virtue of the provisions contained in section 98 of the Act, so that the only remedy to which the mortgagee was entitled was for possession of the mortgaged property under the terms of the mortgage-deed.

The terms of the mortgage appear from the judgment of the Judicial Committee.

1929, February 22. *Dunne K. C.* and *S. Hyam*, for the appellant.

The respondents did not appear.

March 15. The judgment of their Lordships was delivered by LORD TOMLIN:—

This is an appeal by the plaintiff in the suit from a decree dated the 26th of October, 1926, of the Chief Court

of Oudh which varied a decree, dated the 13th of August, 1925, of the court of the Subordinate Judge at Rae Bareli.

On the 8th of April, 1923, a mortgage, which was duly registered, was executed by the first two defendants in favour of the third defendant to secure an advance of Rs. 30,000 carrying interest at the rate of 5 annas and 1 pie per cent. per month.

By clause 2 of this mortgage it was stated that an 8 annas share in certain villages had been hypothecated in lieu of the principal mortgage money and interest, and in order to pay the annual interest on the mortgage-money possession over the hypothecated property had been delivered to the mortgagee, who, after paying the revenue, should appropriate the surplus profits to the extent of the annual interest.

By clause 3 the mortgage-money was promised to be repaid within 35 years, and at the stipulated time when in Khali fasl in the month of Jeth, or at any other time, the mortgagors should pay money to the mortgagee the mortgaged property should become redeemed.

The fourth clause of the mortgage contained a further provision that the mortgagors should remain entitled to eject tenants, to enhance rent, to cultivate land and to issue leases, and after enhancement and payment of interest if there be left any surplus, or if the mortgagors pay any year or each year any amount of money, then that money should be deemed to have been paid towards the principal, and interest on the money so paid should be deducted; and that the mortgagee like the mortgagors, should possess all the remaining powers during the period of his possession.

By clause 5 it was provided that if the mortgagors fail to pay the mortgage-money and fail to redeem the mortgage at the appointed time, then the mortgagee should have power to realise the money due to him by

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sale of the mortgaged property; and that if the mortgaged property should be found to be insufficient to satisfy the full demand then the mortgagee should be entitled to recover the balance from the other properties of the mortgagors. By clause 7 it was provided that if on the claim of any person any part or whole of the mortgaged property were to go out of the mortgagee's possession, or if there were to arise any disturbance in the mortgagee's possession, then the liability therefor should rest with the mortgagors.

The money was duly advanced, but the two first defendants failed to deliver possession of the mortgaged property to the third defendant. By a deed of transfer, dated the 17th of April, 1924, and registered on the 22nd of April, 1924, the third defendant transferred the mortgage and her rights thereunder to the plaintiff.

On the 14th of May, 1924, the plaintiff filed a petition of plaint against the three defendants in the court of the Subordinate Judge at Rae Bareli, claiming a decree for recovery of Rs. 30,000 and Rs. 1,250-15-6 for interest by sale of the mortgaged property and if for any reason a decree for sale could not be passed then a simple money decree for Rs. 31, 250-15-6.

The first two defendants filed their written statement on the 28th of August, 1924, claiming that the suit ought to be dismissed (*inter alia*) for the following reasons—that the mortgage deed was not such as might legally, if the mortgagee did not get possession, entitle him to obtain a simple money-decree or recover his money by sale of the mortgaged property before the time fixed (that is the expiration of 35 years) and was not one to which section 68 of the Transfer of Property Act applied and that in view of certain facts alleged in the written statement the plaintiff was estopped from bringing the suit.

By his judgment, dated the 13th of August, 1925, the Subordinate Judge found on all issues of fact in favour of the plaintiff and in particular he found that the first two defendants had failed to put the mortgagee in possession and had remained in possession themselves, and as to the issue whether the plaintiff was entitled to sue for a sale or a money-decree he held that the plaintiff was entitled to a sale-decree under section 68 of the Act and passed a decree giving the two first defendants till the 13th of February, 1926, to redeem the property at the amount for principal interest and costs mentioned in the decree and in default of payment on or before that date a sale was ordered.

On the 17th of November, 1925, the first two defendants appealed to the Chief Court of Oudh at Lucknow.

The court allowed the appeal, setting aside the decree of the court below and in lieu thereof granting a decree for possession of the mortgaged property.

The learned Judges of the Chief Court held that the mortgage in question was an anomalous mortgage and not a combination of a simple mortgage and an usufructuary mortgage and therefore that section 68 of the Act was excluded and section 98 of the Act applied under which the plaintiff was only entitled to a decree for possession in accordance with the terms of the mortgage deed, their view of the mortgage deed being that under it the mortgage-money was not recoverable before the expiry of 35 years and therefore that the mortgagee's right to enter into possession and the mortgagors' obligation to deliver possession must be given effect to.

The plaintiff obtained leave to appeal to His Majesty in Council and appealed accordingly. On the appeal none of the defendants appeared.

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In order to appreciate the point to be determined it is necessary to refer to the relevant sections of the Transfer of Property Act.

A simple mortgage and an usufructuary mortgage are defined in section 58(b) and (d) of the Act, as follows :—

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“58(b). Where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage-money, and agrees, expressly or impliedly, that in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage-money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee.

“58(d). Where the mortgagor delivers possession of the mortgaged property to the mortgagee, and authorizes him to retain such possession until payment of the mortgage-money, and to receive the rents and profits accruing from the property and to appropriate them in lieu of interest or in payment of the mortgage-money, or partly in lieu of interest and partly in payment of the mortgage-money, the transaction is called an usufructuary mortgage and the mortgagee an usufructuary mortgagee.”

Section 67 of the Act provides as follows :—

“In the absence of a contract to the contrary the mortgagee has at any time after the mortgage-money has become payable to him and before a decree has been made for the redemption of the mortgaged property or the mortgage-money has been paid or deposited as hereinafter provided a right to obtain from the court an order that the mortgagor shall be absolutely debarred of his right to redeem the property or an order that the property be sold.”

Section 68 of the Act is as follows :—

“68. 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 to him, or to secure the possession thereof to him without disturbance by the mortgagor or any other person.”

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Section 98 of the Act is headed “Anomalous mortgages” and is in the following terms:—

“In the case of a mortgage not being a simple mortgage, a mortgage by conditional sale, an usufructuary mortgage or an English mortgage, or a combination of the first and third, or the second and third, of such forms, the rights and liabilities of the parties shall be determined by their contract as evidenced in the mortgage-deed, and, so far as such contract does not extend, by local usage.”

The first question is whether upon its true construction the mortgage is one which is outside the scope of section 98 and secondly if it is outside the scope of that section to what remedy the plaintiff is entitled having regard to the provisions of sections 67 and 68.

In their Lordships’ opinion the mortgage is a combination of a simple mortgage and an usufructuary mortgage. The only clause in the mortgage which presents any difficulty is clause 4, but that clause appears in their Lordships’ view at most only to enable the mortgagors to act as manager without in any way detracting from the effect of clause 2, which entitled the mortgagee to possession. On this view of the construction of the mortgage-deed section 98 of the Act has no application to the case.

It is plain according to the findings of the Subordinate Judge that the first two defendants have failed to discharge their obligation of making over possession to the mortgagee and have thereby deprived the mortgagee of part of his security and in these circumstances their

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Lordships are of opinion that under section 68 the money has become payable and the plaintiff is entitled to a money decree for the same, but if the money has become payable under section 68 their Lordships are further of opinion that under section 67 a decree for sale can be made. It would indeed be a startling result of the legislation if in such a case as this where a default has been made by the mortgagors of a kind which materially affects the mortgagee's security there existed no remedy for the immediate enforcement of the mortgage.

In the result, therefore, their Lordships are of opinion that the appeal should be allowed with costs and the order of the Subordinate Judge restored with the date for redemption extended for 6 calendar months from the date of His Majesty's Order hereon and their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellant: *Barrow, Rogers and NEVILL.*

FULL BENCH.

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*Before Mr. Justice Wazir Hasan, Acting Chief Judge,
Mr. Justice Gokaran Nath Misra and Mr. Justice
A. G. P. Pullan.*

HEWANCHAL SINGH (DEFENDANT-APPELLANT) v.
AJODHIYA SINGH, PLAINTIFF AND ANOTHER (DEFENDANT-
RESPONDENTS).*

Pre-emption—Sale of joint Hindu family property by manager—Right of a member of the joint Hindu family to pre-empt.

Where property belonging to a joint Hindu family is sold by the manager of the family for family necessity or otherwise, *held*, that according to the provisions of the Oudh Laws Act (XVIII of 1876) a member of the joint Hindu family when he is possessed of the status of a co-sharer on the date of the sale on the basis of his interest in immovable pro-

*Second Civil Appeal No. 180 of 1928, against the decree of M. Mahmud Hasan Khan, Subordinate Judge of Sitapur, dated the 28th of January, 1928, confirming the decree of Pandit Pradyumna Krishna Kaul, Munsif of Sitapur, dated the 31st of March, 1927, decreeing the plaintiff's claim.