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PAHALWAN  
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EMPEROR

appellant, acquit him of the offences charged and order his immediate release.

*Appeal allowed.*

### APPELLATE CIVIL

*Before Mr. Justice Bisheshwar Nath Srivastava and  
Mr. Justice E. M. Nanavutty*

1934  
March, 21

PANDIT RAM LOCHAN PRASAD (DEFENDANT-APPELLANT)  
v. MUSAMMAT RAM RAJI (PLAINTIFF-RESPONDENT)\*

*Transfer of Property Act (IV of 1882), sections 58 and 98—Simple mortgage—Anomalous mortgage—Express provision of power of sale, whether necessary in simple mortgage—Personal covenant, whether carries a power of sale—Mortgagee authorised to take possession in case of default—Power of sale, whether taken away—Mortgage, whether simple or anomalous.*

It is not necessary for a simple mortgage that there should be an express provision giving the mortgagee a power of sale. Where a mortgage-deed shows clearly that it contains a personal covenant under which the mortgagor undertook to pay the mortgage money on the due date, the personal covenant carries with it, by necessary implication, a power of sale. The fact that the mortgage-deed authorises the mortgagee in case of default to enter into possession of the mortgaged property, cannot take away the power of sale implicit in the personal covenant more particularly when it has been found that the mortgagor failed to put the mortgagee in possession. Such a mortgage is a simple mortgage and is not an anomalous mortgage within the terms of section 98 of the Transfer of Property Act and a decree for sale passed on its basis is correct. *Lingam Krishna Bhupati Devu v. The Maharaja of Vizianagram* (1), *Lalla Prasad v. Hori Lal* (2), and *Lingam Krishna Bhupati Devu Garu v. Sri Mirza Sri Pusapati Vijayarama Gajapatiraj Maharaja Manya Sultan Bahadur* (3), relied on. *Lal Narsingh Partab v. Yaqub Khan* (4), distinguished.

Messrs. *M. H. Kidwai* and *S. C. Dass*, for the appellant.

\*Second Civil Appeal No. 300 of 1932, against the decree of Pandit Shyam Manohar Nath Shargha, District Judge of Gonda, dated the 17th of August, 1932, confirming the decree of M. Mahmud Hasan Khan, Subordinate Judge of Gonda, dated the 13th of July, 1932.

(1) (1911) 8 A.L.J. 594.

(2) (1912) O.C., 90.

(3) (1911) 15 C.W.N., 441.

(4) (1929) I.L.R., 4 Luck., 333.

Messrs. *Aditya Prasad* and *Iqbal Ali*, for the respondent.

SRIVASTAVA and NANAVUTTY, JJ.:—This is a second appeal by a mortgagor and arises out of a suit for a decree for sale on the basis of a mortgage deed dated the 19th of May, 1926. The mortgage deed provides that it was a mortgage without possession for a period of 2 years and that the mortgaged property was hypothecated for payment of the debt of Rs.1,500 which was to carry interest at one per cent. per mensem. The interest was payable every year and in case of default in payment, the amount in default was to be added to the principal money. It further provided that “on the date fixed (the mortgagor) will get the mortgage redeemed on payment of the entire mortgage money with interest and compound interest in a lump sum, and in case of default the mortgagee will have the option (akhtiyar) to get possession of the hypothecated property in lieu of the principal and interest.” The deed was at the end described as a simple mortgage with the condition of usufructuary mortgage.

The lower appellate court has found that the defendant made no attempt to deliver possession to the plaintiff after his failure to redeem the mortgage at the end of the prescribed period. It has further found that the transaction in question was a combination of a simple and a usufructuary mortgage and not an anomalous mortgage within the meaning of section 98 of the Transfer of Property Act. He has accordingly given the plaintiff mortgagee a decree for sale.

The only contention urged in appeal is that on its proper construction the mortgage deed in suit should be held to be an anomalous mortgage within the definition given in section 98 of the Transfer of Property Act. It is conceded that the amendment made by Act XX of 1929 does not apply to the case and that the question has to be decided in the light of the definition as contained in the unamended section. It has been argued

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*JJ.*

with much force that the mortgage in suit cannot be held to partake of the character of a simple mortgage at its inception because there is no provision for sale. We are of opinion that this argument is fallacious. It is not necessary for a simple mortgage that there should be an express provision giving the mortgagee a power of sale. The clause of the mortgage deed which we have quoted above shows clearly that it contains a personal covenant under which the mortgagor undertook to pay the mortgage money on the due date. This personal covenant carries with it, by necessary implication, a power of sale. The fact, that the mortgage deed authorises the mortgagee in case of default to enter into possession of the mortgaged property, cannot take away the power of sale implicit in the personal covenant more particularly when it has been found (and the finding is not challenged) that the mortgagor failed to put the mortgagee in possession.

In *Lingam Krishna Bhupati Devu v. The Maharaja of Vizianagram* (1) there was an instrument of mortgage, which expressed itself that it was a simple mortgage, and provided that "if the whole or a portion of the interest remains unpaid by the due date, the mortgagee shall take possession of the mortgaged properties immediately thereafter, and enjoy the said properties as under usufructuary mortgage." It was held by their Lordships of the Judicial Committee that the mortgagor not having fulfilled his obligations to put the mortgagee in possession, the latter retained the position of a simple mortgagee and that the decree for sale of the mortgaged property was, therefore, a matter of course and perfectly right.

In *Lingam Krishna Bhupati Devu Garu v. Sri Mirza Sri Pusapati Vijayarama Gajapatiraj Maharaja Manya Sultan Bahadur of Vizianagram* (2), it was held by their Lordships of the Privy Council that a simple mortgagee

(1) (1911) 8 A.L.J., 594.

(2) (1911) 15 C.W.N., 441.

was entitled to a decree for sale as a matter of course, notwithstanding that by the terms of the mortgage-bond he had the option on the mortgagor's default in payment of interest to take possession of the mortgaged properties and to enjoy the same as under a usufructuary mortgage. We are of opinion that the principles enunciated in these cases apply to the present case.

In *Latta Prasad v. Hori Lal* (1) decided by the late Court of the Judicial Commissioner of Oudh which is very similar to the present case the mortgage deed provided that the mortgage money with interest at 2 per cent. would be paid in two instalments and in case of non-payment of the first instalment the mortgagee would be entitled to be put in possession of the mortgaged property taking profits in lieu of interest and in case of failure to deliver possession the mortgagee would be at liberty to take possession with the help of the Court. It was held that the mortgage was not an anomalous mortgage but the combination of a simple and usufructuary mortgage to which section 98 of the Transfer of Property Act did not apply. It was further held that if the mortgagors did not deliver possession, the mortgage continued to retain its character of a simple mortgage and a decree for sale was, therefore, permissible.

Reliance was placed by the learned Counsel for the appellant on the decision of their Lordships of the Privy Council in *Lal Narsingh Partab v. Yaqub Khan and others* (2). In this case also the mortgage was held to be a combination of a simple and a usufructuary mortgage. The fact, that the mortgage which was the subject of interpretation by their Lordships contained an express covenant for sale of the mortgaged property, cannot justify the inference sought to be drawn by the learned Counsel for the appellant that the mortgage in the present case cannot be considered to partake of the character of a simple mortgage, because such an express

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(1) (1912) 16 O.C., 90.

(2) (1929) I L.R., 4 Luck., 363.

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provision giving the mortgagee a power of sale is wanting. We think this case is quite distinguishable.

The result, therefore, is that we agree with the lower appellate court in holding that the mortgage in suit is not an anomalous mortgage within the terms of section 98 of the Transfer of Property Act and that the decree for sale passed by it is correct.

We accordingly dismiss this appeal with costs.

*Appeal dismissed.*

## REVISIONAL CRIMINAL

*Before Mr. Justice E. M. Nanavutty*

1934  
March 23

SURAJ LAL AND OTHERS (ACCUSED-APPLICANTS) v. SHEO  
SHANKAR LAL (COMPLAINANT-OPPOSITE PARTY)\*

*Criminal Procedure Code (Act V of 1898), sections 195 and 476—Indian Penal Code (Act XLV of 1860), sections 193 and 211—Perjury—Application to Magistrate to file complaint for offences under sections 193 and 211, I. P. C.—Magistrate filing complaint without making inquiry and without passing order under section 476, legality of—Section 476 proceedings, when to be started on private complaints.*

It is incumbent upon a Magistrate who receives an application requesting him to file a complaint against certain persons charging them with offences under sections 211 and 193 of the Indian Penal Code to record a finding that it is expedient in the interests of justice that an inquiry should be made into the offences of sections 193 and 211 of the Indian Penal Code said to have been committed by those persons.

Where, therefore, a person files a complaint under section 476 of the Code of Criminal Procedure read with section 195 of the said Code requesting a Magistrate that a complaint be filed by him against certain persons charging them with offences under sections 211 and 193 of the Indian Penal Code and the Magistrate concerned, without making any inquiry under section 476 of the Code of Criminal Procedure and without passing an order under section 476 of the Code of Criminal Procedure, draws up a complaint addressing it to another Magistrate charging those persons with an offence under section 193 of the Indian Penal Code and further charging one of them with an offence

\*Criminal Revision No. 35 of 1934, against the order of Pandit Shiam Manohar Nath Shargha, Sessions Judge of Gonda, dated the 2nd of December, 1933.