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held to be a reasonable rate of interest and indeed section 72 of the Transfer of Property Act, 1882, provides for such a rate in favour of a mortgagee in possession for certain expenses that he may incur in respect of the mortgaged property. We may say that in the particular circumstances of this case 9 per cent. per annum is not an unreasonable rate of interest.

The appeal therefore fails and is dismissed with costs.

Appeal dismissed.

APPELLATE CIVIL

*Before Sir Syed Wazir Hasan, Knight, Chief Judge, and
 Mr. Justice Bisheshwar Nath Srivastava*

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RAM KHILAWAN (PLAINTIFF-APPELLANT) v. GHULAM
 HUSAIN AND ANOTHER (DEFENDANTS-RESPONDENTS) *

Transfer of Property Act (IV of 1882), section 58(d)—Usufructuary mortgage—Delivery of possession physically of mortgaged property, if necessary—Transfer of Property Amending Act (XX of 1929), if governs transactions entered into prior to amendment—Usufructuary mortgagee under a deed of 1918 if can claim a decree for possession only—Mortgage deed intending that mortgagee should be able to realize mortgage money on failure to get possession of mortgaged property—Mortgagee, if entitled to sue for mortgage money—Construction of deed—One deed, if can be construed according to a decision on another deed framed in different terms.

It is not necessary in the case of a usufructuary mortgage that delivery of possession physically must accompany the execution of a mortgage. The requirements of law will be satisfied if the mortgagor delivers such possession to the mortgagee as the mortgaged property is capable of on the date of the mortgage. Where, therefore, a mortgagor executes a usufructuary mortgage of the property which is already in possession of a prior mortgagee a declaration on his part that he has delivered possession to the mortgagee of the interest which he was mortgaging amply meets the requirements of the law.

*Second Civil Appeal No. 329 of 1931, against the decree of M. Mahmud Hasan Khan, Subordinate Judge of Gonda, dated the 3rd of August, 1931, modifying the decree of Pandit Shyam Manohar Tewari, Munsif of Utraula, dated the 28th of November, 1930.

Marturu Subamma v. Gadda Narayya (1), referred to.

The amendment introduced by the Amending Act (XX of 1929) does not govern transactions entered into and rights and liabilities created before the passing of the Amending Act.

Where a usufructuary mortgage deed was executed in 1918 the relief which the mortgagee can pray for cannot be restricted to a decree for possession only and his right must be determined with reference to the law as it stood before the passing of the Amending Act of 1929.

Where having regard to the personal covenant and to the terms in which it is couched a mortgage deed has the intention that the mortgagee should be able to realize his mortgage money from the property mortgaged in the event of the mortgagor failing to secure the mortgagee in the possession of the security, the mortgagee can sue for a decree for sale of the mortgaged property to realize the mortgage money. *Kashi Ram v. Sardar Singh* (2), distinguished. *Narsingh Partab v. Mohammad Yaqub* (3), and *Sardar Singh v. The Collector of Shahjahanpur* (4), referred to.

One deed cannot be construed according to a decision given upon another deed framed in different terms.

Mr. *B. N. Roy*, for the appellant.

Mr. *Ghulam Hasnain Naqvi*, for the respondents.

HASAN, C.J., and SRIVASTAVA, J. :—This is the plaintiff's appeal from the decree of the Subordinate Judge of Gonda, dated the 3rd of August, 1931, reversing the decree of the Munsif of Utraula, dated the 28th of November, 1930.

In the suit, out of which this appeal arises, the plaintiff asks for a decree for sale of a 1 anna 3 pies zamindari share situate in the village of Agia, tahsil Utraula, in the district of Gonda, and in the alternative for a decree for possession of the same on the basis of a deed of mortgage, dated the 16th of May, 1918. The deed was executed by one Imdad Husain in favour of Ram Khilawan, the plaintiff. Imdad Husain has since died and the defendants to the suit are his heirs in possession of the property in question.

(1) (1917) I. L. R., 41 Mad., 259.

(3) (1929) L. R., 56 I. A., 299.

(2) (1905) I. L. R., 28 All., 157.

(4) (1905) 10 O. C., 14.

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The court of first instance gave a decree to the plaintiff for sale of the mortgaged property. On appeal by the defendants, however, the learned Subordinate Judge set aside the decree of the court of first instance and in lieu thereof granted a decree for possession. The question which the learned Subordinate Judge has decided is formulated by him in the following words :

“Whether the plaintiff is entitled to get a decree for sale of the mortgaged property according to the terms of the deed.”

In answering this question he first held that the deed of mortgage in suit evidenced a usufructuary mortgage pure and simple. Then he found that the mortgage was not accompanied with delivery of possession of the mortgaged property to the mortgagee. To those premises he applied the law contained in section 58, clause (d) of the Transfer of Property Act, 1882, as amended by Act XX of 1929, and came to the conclusion that the plaintiff is entitled to a decree for possession only. As to the Full Bench decision in *Marturu Subbamma v. Gadde Narayya* (1) the learned Subordinate Judge's opinion was that it ceased to be good law since the amendment referred to above.

The second ground of the learned Subordinate Judge's decision is that the personal covenant on the part of the mortgagor contained in the deed of mortgage to repay the mortgage money in the event of any disturbance in the mortgagee's possession did not entitle the plaintiff to a decree for sale.

In applying the law as amended to this case the learned Subordinate Judge overlooked the fact that the amendment does not govern transactions entered into and rights and liabilities created before the passing of the amending Act of 1929, *vide* section 63 of Act XX of 1929. The deed of mortgage in suit was executed, as we have already said, in May, 1918. The relief therefore which the plaintiff prays for cannot be restricted to the

(1) (1917) I. L. R., 41 Mad., 259.

decree for possession only and his right must be determined with reference to the law as it stood before the passing of the Amending Act of 1929. In the Madras case (*supra*) it was held that where a mortgagor fails to deliver possession to his mortgagee the mortgage is not a usufructuary mortgage within the meaning of section 58(d) of the Transfer of Property Act and the mortgagee is entitled to bring a suit for sale of the mortgaged property. If this view means that delivery of possession physically must accompany the execution of the mortgage, with great respect we are unable to follow it. Clause (d) of section 58 of the Transfer of Property Act before it was amended stood as follows :

“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 as usufructuary mortgagee.”

We are of opinion that the requirements of law will be satisfied if the mortgagor delivers such possession to the mortgagee as the mortgaged property is capable of on the date of the mortgage. The contrary opinion would seem to exclude a possessory mortgage from the category of usufructuary mortgages where the mortgaged property is previously mortgaged with possession and is not on the date of the subsequent mortgage in the actual possession of the mortgagor. We do not think that this could have been the intention of the Legislature. In the present case as a matter of fact there was a prior mortgagee in possession and the whole object of the mortgage in suit was the redemption of that mortgage. Further, in the circumstances of this case, we are of opinion that a declaration on the part of the mortgagor contained in the deed of mortgage that he has delivered possession to the mortgagee of

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the interest which he was mortgaging amply meets the requirements of the law.

On the facts as they have happened the plaintiff is clearly entitled to sue the mortgagor for the mortgage money under clause (c) of section 68 of the Transfer of Property Act, 1882, and having regard to the personal covenant contained in the deed of mortgage to which reference has already been made also under clause (a) of the same section which is as follows :

“Where the mortgagor binds himself to repay the same.”

It is clear to our mind that when the right to sue for the mortgage money has arisen under one or the other of the clauses of section 68 it must be held that “the mortgage money has become payable” to the mortgagee within the meaning of section 67 of the Act of 1882—see *Narsingh Partab v. Mohammad Yakub* (1); but as provided by the same section “a usufructuary mortgagee as such” has no authority to institute a suit for sale. The real question therefore for decision is whether the plaintiff of this suit is a pure usufructuary mortgagee or not.

We are of opinion that having regard to the personal covenant and to the terms in which it is couched in the present deed of mortgage we must hold that the intention was that the mortgagee should be able to realize his mortgage money from the property mortgaged in the event of the mortgagor failing to secure the mortgagee in the possession of the security. Against this conclusion the learned Subordinate Judge refers to a decision of the High Court at Allahabad in *Kashi Ram v. Sardar Singh* (2). The personal covenant contained in the mortgage involved in the Allahabad case materially differs from the covenant in the present case and one deed cannot be construed according to a decision given upon another deed framed in different terms.

(1) (1929) L. R., 56 I. A., 299.

(2) (1905) I. L. R., 28 All., 157.

The learned Advocate for the appellant drew our attention to a decision of a Bench of the late Court of the Judicial Commissioner of Oudh in *Sardar Singh v. The Collector of Shahjahanpur* (1). On the construction of the deed before them the learned Judicial Commissioners held that the personal covenant to pay on the part of the mortgagor implied a right in the mortgagee to sue for sale of the mortgaged property. This decision may be perfectly correct on the facts of that case, and one of the important facts found was that the mortgage in question in that case was an anomalous mortgage.

Accordingly we allow the appeal, set aside the decree of the court below and restore the decree of the court of first instance with costs in all courts. In the preliminary decree to be prepared under order XXXIV, rule 4 of the Code of Civil Procedure, a period of six months from today will be allowed to the defendants for payment of the mortgage money.

Appeal allowed.

APPELLATE CIVIL

*Before Sir Syed Wazir Hasan, Knight, Chief Judge, and
Mr. Justice Bisheshwar Nath Srivastava*

BABU RAM CHAUBE (PLAINTIFF-APPELLANT) v. SHEO
HARAKH TEWARI (DEFENDANT-RESPONDENT) *

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Limitation Act (IX of 1908), section 19—Money borrowed and a pronote and receipt executed—Another receipt of the amount of the original debt executed within three years—Receipt, whether forms an acknowledgment under section 19—Evidence Act (I of 1872), section 95—Evidence to show the true meaning of the acknowledgment, admissibility of.

Where the defendant borrowed a sum of money from the plaintiff and executed a pronote and a receipt therefor and again executed a receipt for the amount of the old loan within

*Second Civil Appeal No. 352 of 1931, against the decree of Pandit Kishen Lal Kaul, Subordinate Judge of Fyzabad, dated the 24th of August, 1931, upholding the decree of Pandit Hari Kishen Kaul, Munsif, Haveli, Fyzabad, dated the 30th of March, 1931.