APPELLATE CIVIL

Before Mr. Justice Ziaul Hasan

TULSHI RAM (PLAINTIFF-APPELLANT) *v.* MUSAMMAT MUNA KUAR (DEFENDANT-RESPONDENT)* 1936 *March*, 17

*Limitation Act (IX of 1908), Articles 120 and 144—Mortgage — Suit for possession of leased land—Article 144, whether applies—Transfer of Property Amendment Act (XX of 1929), sections 65-A and 66—Section 66, Transfer of Property Amendment Act, 1929, applicability of, to lease of mortgaged land before amendment—Security rendered insufficient by lease—Lease, whether unenforceable—*Zar-i-peshgi *lease—*Zar-i-peshgi *lease and usufructuary mortgage, distinction between—Lease not creating relationship of debtor and creditor nor reserving right of redemption to lessor but requiring lessee to quit land on expiry of term, whether usufructuary mortgage—Holder of* zar-i-peshgi *lease of mortgaged property, whether falls under section 91, Transfer of Property Act.*

In a suit by auction-purchaser—mortgagee—for possession of certain land leased out by mortgagor after mortgaging the same, it is not necessary for the plaintiff to sue or pray for cancellation of the lease, and therefore his suit is governed by Article 144 and not by Article 120, Limitation Act.

Where a mortgagor leases out certain portions of the mortgaged land before the passing of the Amending Act XX of 1929, section 65-A of the Transfer of Property Act has no application and the case is governed by section 66. Where the security becomes ultimately insufficient on account of the lease, the lease cannot be enforced as against the auction-purchaser of the mortgaged land, more so if the terms of the lease are prejudicial to the interests of the mortgagor himself. *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi* (1), and *Patherpermal Chetty* v. *Muniandy Serval* (2), applied. *Bank of Upper India, Ltd.* v. *Jaggan* (3), distinguished.

Every *zar-i-peshgi* lease cannot be regarded as a mortgage. The main difference between a *zar-i-peshgi* lease and an

*Second Civil Appeal No. 191 of 1934, against the decree of Chaudhri Akbar Husain, I.C.S. District Judge of Sitapur, dated the 8th of May, 1934, reversing the decree of Babu Girish Chandra, Munsif of Sitapur, dated the 15th of January, 1934.

(1) (1907) I.L.R., 34 Cal., 329. (2) (1908) I.L.R., 35 Cal., 551.
(3) (1927) 4 O.W.N., 228.

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usufructuary mortgage is that under the latter the mortgagee is authorized to retain possession until the mortgage-money is satisfied, but in the former lease, the lessee is to retain possession for a definite period only. Where a lease does not show an intention to create the relationship of debtor and creditor nor is the right of redemption reserved to the lessor but the lessee has to quit the land on expiry of the term of the lease, such a lease does not create an usufructuary mortgage.

The holder of a *zar-i-peshgi* lease of mortgaged property is a person interested in such property within the meaning of section 91, Transfer of Property Act. *Pannalal* v. *Rajaram* (1), relied on.

Messrs. *Radha Krishna Srivastava* and *K. N. Tandon*, for the appellant.

Mr. *K. P. Misra*, for the respondent.

ZIAUL HASAN, J.:—These are three connected second appeals against decrees of the learned District Judge of Sitapur dismissing the appellant's suits.

One Sultan Singh was a co-sharer in the village of Bijwar. In 1917 and 1918 he made three simple mortgages of mohal Sultan Singh in favour of Banwari Lal, predecessor-in-interest of Tulshi Ram, the present appellant, for a total sum of Rs.1,000. On the 3rd of October, 1922, he gave a *zar-i-peshgi* lease of about eighteen bighas of land to Musammat Ghuran Jan, respondent in appeal No. 193, for a term of thirty years and received Rs.2,500 as *zar-i-peshgi*. On the 23rd of November, 1927, Sultan Singh executed three leases of fourteen bighas five biswas, twenty-two bighas nineteen biswas and sixteen bighas three biswas in favour of his mother Umrai Kuar, his brother's widow Sohna Kuar (respondent in appeal No. 192) and his own wife Musammat Muna Kuar (respondent in appeal No. 191), respectively. These leases were for planting groves and reserved no rent whatever.

On the 6th of October, 1930, the mortgagee brought a suit on foot of his mortgages and a decree for sale for a sum of about Rs.20,000 was passed in his favour on the 24th of November, 1930. The property was sold in execution of the decree on the 20th of August, 1932,

(1) (1926) Nagpur, 496.

and was purchased by the present appellant for Rs.13,000 On the 20th of August, 1932, the appellant obtained formal possession of the property purchased by him through Court. Before the mortgagee brought his suit for sale there was a partition of the village by which only portions of the land leased out to Ghuran Jan, Umrai Kuar, Sohna Kuar and Muna Kuar remained in mohal Sultan Singh. The suits from three of which these appeals have arisen were brought by Tulshi Ram for possession of those lands against all the four lessees.

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All the suits were decreed by the trial Court. Umrai Kuar submitted to the decree of the trial Court but the other three lessees appealed against that Court's decrees. All the three appeals were allowed by the learned District Judge and the plaintiff's suits against Ghuran Jan, Sohna Kuar and Muna Kuar dismissed. It is against the dismissal of his suits that the plaintiff has brought these three appeals.

In the case against Musammat Ghuran, the learned District Judge held that the lease in her favour was invalid under section 66 of the Transfer of Property Act, as, though the security was not rendered insufficient at the time of the execution of the lease by the mortgagor, it did ultimately prove insufficient within the meaning of the explanation to section 66 of the Transfer of Property Act. The learned District Judge, however, held that the plaintiff's suit as against Musammat Ghuran was barred by limitation under article 120 of the Limitation Act. It is argued before me that the learned District Judge was wrong in his opinion that the suit was barred by limitation and that the article of the Limitation Act applicable to the case is article 144 and not 120. I am of opinion that this contention is well-founded. The learned District Judge has relied on the case of *Bank of Upper India, Ltd.* v. *Jaggan* (1) in which it was held that where a mortgagor in possession of the mortgaged property executes a perpetual lease in favour of a third party,

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a suit by the mortgagee to avoid the lease on the ground that it had the effect of diminishing the security offered for the loan of the money made by him under the mortgage is governed by article 120 of the first schedule of the Indian Limitation Act. In this case, however, the suit appears to have been one for declaration as appears from the following remark in the judgment—

"It appears to us that, having regard to the relief prayed for, the suit is clearly governed by article 120 of the first schedule of the Indian Limitation Act."

The learned Judges go on to say—

"The substance of the plaintiff's case is that he wants to protect his rights as a mortgagee and, as such, he would certainly have a cause of action to obtain a declaration of the nature which he wants to obtain in the present suit, if the act of leasing has caused any permanent injury to his rights as a mortgagee."

This passage also shows that the suit in that case was for a declaration and not for possession. The principle laid down by their Lordships of the Judicial Committee in the case of *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi* (1) is to my mind fully applicable to the present case. In that case the reversioner sued, on the death of a Hindu widow, for possession of the property of her husband of which she was in possession as a Hindu widow and of which she had granted a lease for a term extending beyond her own life and it was held that the widow's alienation was not absolutely void but was *prima facie* voidable at the election of the reversionary heir, who may affirm it or treat it as a nullity without the intervention of any Court, there being nothing to set aside or cancel as a condition precedent to his right of action. It was also held that the institution of a suit for possession by the reversioner shows his election to treat the alienation as a nullity and that in such a suit it is therefore unnecessary for him to ask for a declaration that it is inoperative. In the case of *Patherpermal Chetty* v. *Muniandy Serval* (2) also in which a certain deed was

(1) (1907) I.L.R., 34 Cal., 329. (2) (1908) I.L.R., 35 Cal., 551

found as inoperative against a plaintiff, it was held by their Lordships of the Privy Council that the deed being inoperative it was unnecessary for the plaintiff to have it set aside as a preliminary to his obtaining possession of the property and that the suit was therefore governed by article 144 of schedule II of the Limitation Act (XV of 1877) I am, therefore, of opinion that it was not necessary for the appellant to have sued or prayed for cancellation of the lease in favour of Musammat Ghuran Jan and this being so, the case was governed by article 144 and not by article 120 of the Limitation Act.

It was urged on behalf of the respondent that the *zar-i-peshgi* lease in her favour was as a matter of fact a mortgage and that the present appellant ought to have impleaded the respondent as a subsequent mortgagee in his suit on foot of the mortgages in his favour. The lease in favour of Ghuran is no doubt a *zar-i-peshgi* lease but every *zar-i-peshgi* lease is not to be regarded as a mortgage. The main difference between a *zar-i-peshgi* lease and a usufructuary mortgage is that under an usufructuary mortgage, the mortgagee is authorised to retain possession until the mortgage money is satisfied but in a *zar-i-peshgi* lease, the mortgagee is to retain possession for a definite period only. I have gone through the lease in favour of the respondent and agree with the Courts below that it cannot be said to create an usufructuary mortgage. There appears to be no intention to create the relationship of debtor and creditor. No right of redemption was expressly or impliedly reserved to the lessor but the lessee was to quit the land without any payment on the part of the lessor at the expiry of the term of the lease.

Next it was argued that even if the lease in favour of the respondent be not deemed to be a mortgage the respondent was at least a person having an interest in the mortgaged property within the meaning of section 91(*a*) of the Transfer of Property Act so that she was entitled to redeem the property and was therefore a necessary party to the plaintiff-appellant's suit for sale and that

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as she was not impleaded in that suit, the decree obtained by the appellant is not binding on her. No doubt the respondent appears to be a person interested in the mortgaged property within the meaning of section 91 of the Transfer of Property Act as was held by the Nagpur Judicial Commissioner's Court in a similar case, namely, *Pannalal* v. *Rajaram* (1), but it seems to me that before the respondent can be allowed to take her stand upon the lease in her favour, we must consider whether that lease can be enforced as against the auction purchaser who happens in the present case to be the mortgagee. As the lease in favour of Musammat Ghuran was executed in 1922 section 65A of the Transfer of Property Act has no application and the case must be governed by section 66 of the Act. The learned District Judge has held, and I think correctly, that the plaintiff's security became insufficient ultimately on account of the lease though not at the time of the execution of the lease. The security indeed appears to have become insufficient even independently of any lease. The value of the property has been found by the lower appellate Court to be Rs.16,000 only and the amount due on the mortgages in favour of the plaintiff came to Rs.38,000 in 1930 when the suit for sale was brought though the plaintiff claimed only about Rs.20,000.

From the finding arrived at above it follows that the plaintiff's suit must be decreed against Musammat Ghuran.

The cases of Musammat Muna Kuar and Sohna Kuar are similar. Both are related to the mortgagor and both were given leases of land for planting groves without any premium and without any rent being reserved. The trial Court held the leases in their favour to be fictitious but the learned District Judge held otherwise. The learned Advocate for the appellant has not challenged this finding of the lower appellate Court but has argued the appeals against these two ladies on the question of law whether or not Sultan Singh had power to give the

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leases after mortgaging the property to the appellant. The learned District Judge is not, in my opinion, right in thinking that section 65-A of the Transfer of Property Act applies to these cases as that section was enacted only in 1929 while the leases in favour of Muna Kuar and Sohna Kuar were executed in 1927. In considering these leases, we must therefore fall back upon section 66 of the Transfer of Property Act and as shown above in the case against Musammat Ghuran the security did become insufficient ultimately. It was urged on behalf of the respondents that the leases were executed in the ordinary course of the management of the property and should be upheld. I cannot however accede to this argument. The terms of the leases are so prejudicial to the interests of the mortgagor himself that it is impossible to consider the leases as given in the ordinary course of management. As said above no premium was realized nor was any rent reserved. The lessees were to hold the land not only so long as a single tree stood on the land but also for a further period of five years after the land became totally devoid of trees. It cannot be said for a moment that such leases were necessary or even expedient in the interests of proper management of the property. The plaintiff's suits should in my opinion be decreed against these respondents also.

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All the three appeals are therefore allowed with costs. the decrees of the learned District Judge set aside and the decrees of the trial Court restored.

Appeal allowed.

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SURAJ DIN (JUDGMENT-DEBTOR-APPLICANT) *v.* RAM PRASAD SINGH AND OTHERS (DECREE-HOLDER-OPPOSITE-PARTY)*

Civil Procedure Code (Act V of 1908), section 151—Sale certificate—Property wrongly described—Amendment application—Court, if has power to amend certificate.

*Section 115 Application No. 123 of 1935, against the order of Babu Kamta Nath Gupta, Munsif of Sultanpur, dated the 24th of August, 1935.