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Justice doubted that it had been intended that Article 1(a) of Schedule III should apply to such a case as this. The passage is as follows :

"I think it is doubtful whether the legislature intended by the amendment made in 1907 to compel a landlord to sue for ejection of a tenant of his private land within six months of the termination of the lease held by the tenant, and it may be that the result of holding that a *raiyyat* of *ziraat* land is or may be a non-occupancy *raiyyat* will be that landlords will be placed in a less favourable position than the framers of the Act intended, but we must take the Act as we find it, and on a consideration of the Act as it now stands, it appears to me that the only possible conclusion is that Article 1(a) of Schedule III applies to such a suit as the one now before us".

Their Lordships are of opinion that Article 1(a) of Schedule III of the Bengal Tenancy Act, 1885, does not apply to suits to eject persons, who were not in law non-occupancy *raiyyats* of the land, and consequently does not apply to this suit, and that the suit was brought within time, and they will humbly advise His Majesty that this appeal should be allowed, that the decree of the High Court of the 24th July, 1917, should be set aside with costs; and that the decree of the 7th February, 1917, should be restored. Janki Singh must pay the costs of this appeal.

*Appeal allowed.*

Solicitors for the appellant : *T. L. Wilson & Co.*

## APPELLATE CIVIL.

*Before Coutts and Ross, J.J.*

JAG SAHU

v.

MUSSAMMANT RAM SARHI KUER.\*

*Transfer of Property Act, 1882 (Act IV of 1882), section 67—usufructuary mortgage—debt repayable on a certain date—expiry of period for repayment—Mortgagee's right to sue for sale.*

Where a mortgage bond gives the mortgagee a right to possession and also contains a covenant by the mortgagor to

\* Appeal from Appellate Decree No. 1030 of 1920, from a decision of G. J. Monahan, Esq., District Judge of Saran, dated the 31st March, 1920, modifying a decision of M. Mahmud Hasan, Munsif of Chapra, dated the 6th February, 1919.

repay the consideration money on a particular date, the mortgagee is entitled to sue for sale of the mortgaged property immediately after the due date has passed.

*Pargan Pandey v. Mahtam Mahto*(1), *Pitambar Purkait v. Madhu Sudan Mandal*(2) and *Dattambhat Rambhat Joshi v. Krishnabhat bin Govindbhat Joshi*(3), approved.

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Appeal by the plaintiff.

The facts of the case material to this report are stated in the judgment of Coutts, J.

*K. P. Jayaswal* (with him *Sundar Lal*), for the appellant :

The suit is on two mortgages executed in favour of the appellant by defendant No. 1's husband. One is a simple mortgage and the other a *zarpeshgi*. Defendants Nos. 2 to 4 purchased the property covered by the bonds and retained a portion of the purchase money to be paid to the mortgagee. The due date of the *zarpeshgi* was the 30th *Bhado*, 1317, and of the simple mortgage the 30th *Jeth*, 1319. A tender of the amount due in the latter mortgage is alleged but the date is not stated in the written statement. It is said to have been made a few days after the purchase. A certain amount of interest must have accrued between the date of the purchase and date of the tender. The tender was short by this amount and was therefore bad [*Bubhai Goundan v. Palani Goundan* (4)]. It is not proved or found that the tender was kept alive. The defendants were bound to show that they always had the amount ready. It is on the same footing as a deposit in court [*Krishnasami Chettiar v. Thippa Ramasami Chettiar* (5)]. The English law applies to India [*Gyles v. Hall*(6), *Edmondson v. Capland*(7), *Satyabadi Behara v. Harabati* (8) and *Jagat Tarini Dusi v. Naba Gopal Chaki*(9)].

(1) (1907) 6 Cal. L. J. 143.

(5) (1912) I. L. R. 35 Mad. 44.

(2) (1910) 6 Ind. Cas. 153.

(6) (1726) 2 P. Wms. 373; 24 E. R. 774.

(3) (1910) I. L. R. 34 Bom. 462.

(7) (1911) 2 C. h. D. 301 (310).

(4) (1915) 34 Ind. Cas. 825.

(8) (1907) I. L. R. 34 Cal. 223 (229).

(9) (1907) I. L. R. 34 Cal. 305.

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Although the mortgagee is in possession he is entitled to a mortgage decree on the *zarpeshgi*, the due date having expired. It is not a case of a pure usufructuary mortgage but of an anomalous mortgage [See *Pargan Pandey v. Mahtam Mahto* (1), *Pitambar Purkait v. Madhu Sudan Mandal* (2) and *Dattambhat Rambhat Joshi v. Krishnabhat bin Govindabhat Joshi* (3)]. The fact that the mortgagee in those cases was out of possession is immaterial. The principle is applicable. The point arose on the pleadings in this case and should have been considered by the lower court.

*Ram Prasad, Harnarain Prasad, Shiveshwar Dayal and Jadubans Sahay*, for the respondents: Sufficiency of tender is concluded by the finding of fact [*Haji Mahomed Mozaffer Ali Bhuyan v. Asraf Ali* (4)]. It was not necessary to show that the tender was kept alive [*Velayuda Naicker v. Hyder Hussan Khan Sahib* (5)]. The question as to the *zarpeshgi* being an anomalous mortgage was not argued in the lower court and cannot be raised now. The relief claimed is on the ground of dispossession but the plaintiff has been found to be in possession.

[*Jayiswal: Velayuda Naiaker v. Hyder Hussan Khan Sahib* (5) has been doubted in *Krishnasami Chettiar v. Thippa Ramasami Chettiar* (6). It is contrary to first principles and the decisions of the Calcutta High Court.]

Appellants not called upon to reply.

COURTS, J.—This is an appeal against a decision of the District Judge of Saran dismissing an appeal against an order of the Subordinate Judge of Saran partially decreeing a suit which was brought on a *zarpeshgi* deed and a simple mortgage bond. The so-called *zarpeshgi* deed is dated the 21st of September

(1) (1907) 6 Cal. L. J. 145.

(4) (1914) 25 Ind. Cas. 93.

(2) (1910) 6 Ind. Cas. 153.

(5) (1910) I. L. R. 33 Mad. 100.

(3) (1910) I. L. R. 34 Bom. 462.

(6) (1912) I. L. R. 35 Mad. 44.

1905, and was for a sum of Rs. 1,850. The simple mortgage bond is dated the 7th of June, 1911, and was of a sum of Rs. 400 advanced on the security of the same property as was mortgaged by the previous deed of the 21st of September, 1905. The deeds were both executed by one Kanchan Singh, the husband of the defendant No. 1, Musammat Ram Sakhi Kuer, in favour of the plaintiff No. 1, Jag Sah, and Ram Sahai Sah, ancestor of the other plaintiffs. The defendants Nos. 2, 3 and 4 purchased the mortgaged property from the defendant No. 1 on the 7th of November, 1914, the arrangement being that out of the consideration money the sum of Rs. 652 was to be kept for payment of the mortgage debt due on the bond of the 7th of June, 1911, and the sum of Rs. 1,850 for the payment of the debt due on the deed of the 21st September, 1905. The defendants' case was that at the time they purchased the mortgaged property they tendered the sum of Rs. 652 to the plaintiff No. 1 in payment of the mortgage debt, but the plaintiff refused to accept the money and claimed a right of pre-emption in the property. The defendants then waited for a year until a suit for pre-emption would be barred and deposited the amount in Court. On these allegations the defendants contended that the plaintiffs' mortgage debt had been satisfied by the amount Rs. 652 which was deposited by them and they further contended that as the plaintiffs were in possession of the property mortgaged by the deed of the 21st of September, 1905, they were not entitled to sue for sale of the property as they had done in this suit.

In the Court of first instance it was decided that the plaintiffs, on the allegations of the defendants, which were accepted, could claim no interest beyond what was included in the Rs. 652; and with regard to the claim to sell the property to satisfy the debt of Rs. 1,850 a curious order was passed by which the suit was decreed in the plaintiffs' favour "only so far as, if he has been really dispossessed he can take possession

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What this may mean I do not know. On appeal to the District Judge the decision of the first Court in regard to interest was upheld and in regard to the claim on the deed of the 21st of September, 1905, for sale of the mortgaged property, the learned District Judge held that as the plaintiffs had not been dispossessed they were not entitled to sue for sale of the mortgaged property. In the result the whole suit was dismissed. The plaintiffs have appealed to this Court.

Three points are urged before us. The first is that the tender of Rs. 652 was less than the total amount due and that consequently it was not a valid tender and the plaintiffs were not bound to accept it. The second point urged is that assuming that a valid tender had been made still the defendants must establish that the amount tendered had been kept always available for payment and they not having established this the tender was not a valid tender. The third point urged is that the so-called *zarpeshgi* deed of the 21st of September, 1905, was not a pure usufructuary mortgage inasmuch as a due date for payment had been fixed on the bond; it was an anomalous mortgage and that in such a case the plaintiffs were entitled to sue for sale of the mortgaged property.

With regard to the first of these points it was never suggested either in the Court of first instance or before the lower appellate Court that the sum tendered, Rs. 652, was insufficient at the time of tender and it is impossible at this stage without going into evidence to say whether the amount was sufficient or not. This is a second appeal and the question of sufficiency or insufficiency cannot be gone into at this stage. With regard to the second point urged, here again the contention must fail because it was never suggested that the money was not kept available by the defendants although it is necessary that a mortgagor should after tender keep the money ready for payment. It is a matter which involves a consideration of

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evidence whether in fact the money was kept ready or not and both the Courts below having assumed that all the provisions of the law in respect of the tender had been complied with, we cannot allow this point to be taken at this stage. The third point urged is that a due date having been fixed for payment of the mortgage money under the deed of the 21st of September, 1905, the mortgage was not a pure usufructuary mortgage and, therefore, the plaintiffs were entitled to sell immediately after the due date was passed even though they still remained in possession of the property. In support of this proposition the decisions in *Pargan Pandey v. Mahtam Mahto* (1), *Pitambar Purkait v. Madhu Sudan Mandal* (2) and *Dattambhat Rambhat Joshi v. Krishnabhat bin Govindbhat Joshi* (3) are relied on and it seems to me that this is the correct view of the law. The question was very fully discussed in *Pitambar Purkait v. Madhu Sudan Mandal* (2) in which the mortgage was one in exactly the same terms as the mortgage in the case with which we are at present concerned; and in that case the learned Judges said "it is well settled that when an instrument of mortgage gives a right to possession and also contains a covenant to pay, thus presenting a combination of a usufructuary and a simple mortgage, the two rights are independent and the mortgagee may sue for sale although he may have given up possession, and the right accrues immediately after the due date is passed". The same view was taken in the other cases to which I have already referred and, as I have already said, this in my opinion is the correct view of the law.

In the result then I would modify the decree of the lower appellate Court. The parties are agreed that the sum due is Rs. 1,675. I would accordingly direct that the plaintiffs be allowed to sell the mortgaged property for this sum, the defendants being

(1) (1907) 6 Cal. L. J. 143.

(2) (1910) 6 Ind. Cas. 153.

(3) (1910) I. L. R. 34 Bom. 462.

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allowed six months' time to pay up the amount. Costs in proportion to the success of the parties.

Ross, J.—I agree.

*Decree modified.*

## APPELLATE CIVIL.

*Before Courts and Ross, J. J.*

KUMAR GANGA SINGH

v.

PIRTHICHAND LAL.\*

1922.

Jan. 25.

*Injunction—Jurisdiction of court—power to restrain proceeding in another court.*

A court has jurisdiction on the application of the plaintiff in a suit in which the defendants have entered appearance to issue a temporary injunction restraining the defendants from executing in another court a decree which they have obtained against the plaintiff.

*Vulcan Iron Works v. Bishumbhur Prasad*(1) and *Jumna Dass v. Harcharan Dass*(2), distinguished.

*Begg Dunlop and Company v. Jagannath Marwari*(3), *Carron Iron Company v. Maclaren*(4), *Dawkins v. Simonetti*(5), and *Mulchand Raichand v. Gill and Company*(6), referred to.

The facts of the case material to this report were as follows:—

On the 8th January, 1920, Prithichand Lal Chowdhury, the defendant in the present suit, obtained, in the court of the Subordinate Judge of Purnea, a final decree in two mortgage suits against the present plaintiffs' father. On the 23rd December, 1920, the plaintiffs instituted the present suit in the court of the Subordinate Judge of Bhagalpur to set aside the

\* Appeal from Original Order No. 136 of 1921, from an order of M. Rhtisham Ali Khan, Subordinate Judge of Bhagalpur, dated the 31st May, 1921.

(1) (1909) I. L. R. 36 Cal. 233.

(4) (1855) 5 H. L. G. 416.

(2) (1911) I. L. R. 38 Cal. 405.

(5) (1830-81) 29 W. R. 228.

(3) (1912) I. L. R. 39 Cal. 104.

(6) (1920) I. L. R. 44 Bom. 283.