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opinion these notes are for a sum certain within sections 4 and 5 of the Act before mentioned and, therefore, are negotiable instruments within the meaning of the Negotiable Instruments Act, 1881.

There was a further point urged which it is unnecessary to decide if my view expressed above is correct and that was that if these notes not being negotiable instruments are to be regarded as simple bonds then they are insufficiently stamped. The answer to this however is that this point was not taken in the court below, the notes were received in evidence without objection and it is not open to the appellants to rely upon it now. And in any event all that we could do in the appeal would be to levy the deposit fee and penalty if the fact had been established that stamps were insufficient.

In my opinion the appeal fails both on the facts and the law and must be dismissed with costs.

MULLICK, A.C.J.—I agree.

Appeal dismissed.

APPELLATE CIVIL.

Before Jwala Prasad and James, JJ.

RAGHUBAR NARAIN CHAUDHURI

v.

MOHIT NARAYAN JHA.*

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 June, 17.

Mortgagee, usufructuary, whether liable to render accounts—circumstances creating liability—Transfer of Property Act, 1882 (Act IV of 1882), section 77.

* Appeals from Appellate Decree nos. 610 and 753 of 1926 from a decision of W. H. Boyce, Esq., I.C.S., District Judge of Darbhanga, dated the 4th March, 1926, confirming a decision of Babu Jatindra Nath Ghosh, Subordinate Judge of Darbhanga, dated the 28th October, 1925.

Under a mortgage bond the usufructuary mortgagee was entitled to appropriate in lieu of interest the profits remaining after the payment of Government revenue and malikana to the malikanadars, and there was a condition that all profits from increased income would go to the mortgagee. The mortgagee made additional profits by escaping payment of malikana to the malikanadars. The assignee of the equity of redemption having brought a suit for redemption as well as for accounts,

Held, that the usufructuary mortgagee was not liable to render accounts in respect of the malikana.

Fakir Muhammad Khan v. Ali Sher Khan (1) and *Shafiq Nissa v. Fazal Rao* (2), followed.

Basant Rai v. Kanauji Lal (3), *Narsingh Narain Singh v. Babu Lakhputty Singh* (4), *Jaijit Rai v. Gobiind Tirari* (5) and *Parasuramar Pattar v. Venkatachala Pattar* (6), distinguished.

Appeal by the defendant mortgagee.

This appeal arose out of a suit for redemption of an usufructuary mortgage executed on the 13th of February, 1882, in respect of an interest in mauza Nooruddinpur, which was described by the plaintiff as a permanent tenure. The property in question consisted of the third-part of a two-anna share in the mauza, which was burdened at the time of the execution of the mortgage, with liability to payment of malikana to the heirs of rival claimants to settlement whose claims were disallowed at the Permanent Settlement of the mauza. The sum of seven hundred rupees was advanced on the mortgage. The annual profits were stated in the deed to be Rs. 91-15-0, of which Rs. 84 were allotted for interest; Rs. 5-8-0 was payable to Ganga Ram Chowdhury and his co-sharers as malikana; while Rs. 2-7-0 as Government Revenue was to be paid by the mortgagees. There was a condition that all profits

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(1) (1911) 10 Ind. Cas. 113.

(2) (1910) 7 All. L. J. 787.

(3) (1880) I. L. R. 2 All. 455.

(4) (1880) I. L. R. 5 Cal. 395.

(5) (1884) I. L. R. 6 All. 303.

(6) (1913) 21 Ind. Cas. 701.

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arising from increased income should go to the mortgagees, and the mortgagors would have no concern with them. The plaintiff, who had purchased the equity of redemption, claimed an account in respect of the payment of these annual dues; and it was suggested that on taking the account it would be found that not only had the principal been satisfied but the mortgagees would be liable to pay about fourteen hundred rupees to the plaintiff. The mortgagees denied their liability to account; but they admitted that malikana had not been paid to Ganga Ram Chowdhury, saying that they themselves were the maliks and if anybody was entitled to malikana they were the persons entitled to it. Their pleadings on this point were expressed indefinitely, because they also made an attempt, which appeared to have been without justification, to make out that the mortgagors were not entitled to the property which they mortgaged, and that the mortgagees possessed it as absolute proprietors.

The Subordinate Judge who tried the suit did not permit the defendants to enter into evidence regarding the alleged want of title of their mortgagors, so that no evidence was given on this point. On the question of the right to malikana their line of defence placed the mortgagees in a difficult position, because they could not prove that they themselves were entitled to the malikana without admitting that the right to malikana existed, which amounted to an admission of the existence of the so-called tenure. The Subordinate Judge found that the mortgagees were not liable to account: so that the question of whether they were themselves the persons entitled to malikana, and of whether they should be deemed to have satisfied the claim to malikana by merely keeping for themselves the sum allotted for the annual payment did not in his view arise in the case. He decreed the suit, finding that the plaintiff must pay Rs. 700 to the mortgagees before he could recover possession of the mortgaged property.

The plaintiff appealed to the District Judge who held that as malikana was payable to Ganga Ram Chowdhury by the terms of the mortgage, and the malikana had admittedly not been paid to anybody, the plaintiff must be credited with this amount of Rs. 5-8-0 annually towards the redemption of the principal money advanced on the mortgage, from the very inception of the mortgage; and he directed that an account should be taken on this principle with annual rests. In the result it was found, on taking the account in this way, that instead of being liable to pay seven hundred rupees to the mortgagees the mortgagors were entitled to receive a sum of Rs. 3,154.

The mortgagees appealed to the High Court from that decision; and an appeal was also preferred by the mortgagors against the decision of the learned District Judge on other points.

Pugh (with him *S. K. Mitter*), for the appellants.

Hasan Imam (with him *K. P. Jayaswal* and *K. P. Sukul*), for the respondents.

JAMES, J. (after stating the facts as set out above, proceeded as follows:) The most important question for consideration in these appeals is whether the usufructuary mortgagees are liable to account or whether they are entitled to claim the benefit of the provisions of section 77 of the Transfer of Property Act. The mortgage bond specifies a sum of Rs. 91-15-0 as the annual income which the mortgagees may expect to derive from the property; but it is expressly provided that any income in excess of this shall go to the mortgagees in possession and that the mortgagors will have no concern with it. Mr. Pugh contends on behalf of the appellants that the assignee of the equity of redemption is not concerned to know how the mortgagees applied their annual profits, provided that no additional liability was thereby cast upon the mortgagors. Mr. Hasan Imam cites a number of cases. [*Basant Rai v. Kanauji Lal* (1),

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Narsing Narain Singh v. Babu Lukputty Singh (1), *Jaijit Rai v. Gobind Tiwari* (2) and *Parasuramar Pattar v. Venkatachala Pattar* (3)] in all of which the usufructuary mortgagees were made to account. In the case of *Basant Rai v. Kanauji Lal* (4) the mortgagee undertook by his mortgage bond to pay malikana out of the profits and failed to pay it; but it is to be noted that malikana was payable in that case to the mortgagor. In the case of *Jaijit Rai v. Gobind Tiwari* (2) the mortgagee failed in his contract to pay Government revenue from the profits, and the assignee of the equity of redemption was compelled to pay in order to save the property. Mr. Pugh does not deny that the mortgagees would be liable to account if by their mortgage deed the malikana had been payable to the mortgagors, or if owing to the default of the mortgagees the mortgagors had themselves been obliged to pay malikana to Ganga Ram Chowdhury; and indeed in all the cases cited by Mr. Hasan Imam the usufructuary mortgagees were required to account because by their omission to fulfil the terms of the mortgage contracts the mortgagors had been made to suffer specific losses; that is to say the mortgagee had failed to pay to the mortgagor rent or malikana reserved by the mortgage deed, or in other cases the mortgagors had been obliged to make payments which the mortgagees had undertaken to make.

In the present case we are asked to declare the mortgagees liable to account, not because of any default affecting the mortgagors, but on the ground that they have obtained as profits the money which ought under the deed to have been paid to the malikana-dars. This case would appear to resemble that of *Fakir Muhammad Khan v. Ali Sher Khan* (5) wherein the mortgagee, who was entitled by his mortgage to appropriate in lieu of interest the profits remaining after the payment of rent to the zamindar,

(1) (1880) I. L. R. 5 Cal. 333.

(3) (1913) 21 Ind. Cas. 701.

(2) (1884) I. L. R. 6 All. 303.

(4) (1880) I. L. R. 2 All. 454.

(5) (1911) 10 Ind. Cas. 113.

had for several years escaped payment of rent. In that case it was held that this fact gave no ground for taking accounts: the mortgagee was entitled to all the profits he could make out of the property, and it happened that he had managed to add to the profits the rent of several years. We need not doubt that the result of the case would have been different if the rent had been payable to the mortgagor, or if the mortgagor had himself been obliged to pay the rent to save the property. Another case in point is that of *Shafi-un-Nissa v. Fazal Rao* (1) wherein it was held that an usufructuary mortgagee is not liable to account unless there is an express stipulation therefor. We are of opinion that the mortgagees' failure to pay the malikana does not render them liable for account, nor does it necessarily affect the liability of the mortgagors to pay the mortgage money before they can recover possession of the property. The utmost that the mortgagors can be allowed to claim is that they should be indemnified against the contingency that a valid claim for arrears of malikana may be made against them after their recovery of possession. It is not clear who is entitled to malikana or whether anybody is now entitled. It has been suggested in the course of argument that the mortgagees as reversionary heirs of Ganga Ram Chowdhury may have now become entitled to the malikana; but this has not been proved. The claim which was made, but not proved, in the trial of the case, that the mortgagees are now the malikanadars because they are registered as proprietors, is of doubtful validity, since the malikana was payable to maliks out of possession, not to proprietors in possession; but this is a question on which we cannot give judgment since it has not been tried out, and the evidence on the record is scanty. There appears to be possibility that some person entitled to malikana may be able to recover twelve years' arrears from the plaintiff after he has obtained possession of the mortgaged

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property; and the mortgagees must give him an indemnity against this contingency.

* * * *

The result is that the mortgagee's appeal no. 610 will be decreed, while the mortgagor's appeal no. 753 will be dismissed. The decree of the District Judge is set aside and the decree of the Subordinate Judge is restored, with these modifications, that the date by which the sum of seven hundred rupees is to be paid to the defendants by the plaintiff, will be fixed as September the 19th, 1927; and that by August the 19th, 1927, the mortgagees must execute a bond in the sum of Rs. 110 to the satisfaction of the Subordinate Judge, indemnifying the mortgagor against the possibility of his being made liable to pay twelve years' arrears of malikana after recovery of possession, and if this indemnity bond is not duly executed within the period prescribed, the plaintiff will be permitted to redeem on payment of the sum of Rs. 950. The plaintiff Mohit Narain Jha will bear the costs of defendants 1st party in this Court and in the Lower Appellate Court.

JWALA PRASAD, J.—I agree.

Appeal dismissed.

APPELLATE CRIMINAL.

Before Ross and Wort, JJ.

TAJALI MIAN

v.

KING-EMPEROR.*

Code of Criminal Procedure, 1898 (Act V of 1898), sections 276 and 278—out of jurors summoned only five present—trial by these five—whether trial legal—objection to juror on ground of partiality.

Where an accused person objects to a juror on the ground of partiality the objection must be upheld even though the partiality is not actual but presumed.

* Criminal Appeal no. 100 of 1927, from a decision of J. G. Shearer, Esq., i.c.s., Sessions Judge of Bhagalpur, dated the 15th of May, 1927.