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the plaintiff may have a remedy against the defendant for breach of his promise, he is not entitled to have the deed of the 11th November, 1921, rescinded because the defendant did not carry out his promise. But, in my view, the plaintiff has not established in this case that the defendant agreed to pay Rs. 1,500 to Durga Prasad.

I am of opinion that the learned Subordinate Judge should have dismissed this suit. I would accordingly allow the appeal, set aside the judgment and the decree passed by the Court below and dismiss the suit with costs in both the Courts as against the respondent. The cross-objection is dismissed.

ALLANSON, J.—I agree.

Suit and cross-objection dismissed.

APPELLATE CIVIL.

Before Kulwant Sahay and Macpherson, JJ.

1928.

May, 30.

CHHATHI LAL SAH KALWAR

v.

BINDESHWARI PRASAD SAHU.*

Mortgage—Zarpeshgi deed for a term—no covenant to repay debt—suit for recovery of loan, whether maintainable—Transfer of Property Act, 1882 (Act IV of 1882), section 58(d)—Zarpeshgi—mortgagee not entitled to retain possession up to repayment of debt—whether transaction is an usufructuary mortgage.

There is an implied covenant on the part of a mortgagor to repay the mortgage money, even though the bond contains no express promise to repay it.

Where a zarpeshgi deed is executed for a term of years and does not authorise the mortgagee to retain possession

*Appeal from Appellate Decree no. 1593 of 1925, from a decision of Babu Promotho Nath Bhattacharjee, Subordinate Judge of Saran, dated the 30th June, 1925, affirming a decision of M. Saiyid Nasiruddin Ahmad, Munsif of Chapra, dated the 9th July, 1924.

until repayment of the mortgage money, it is not an usufructuary mortgage as defined in section 58(*d*) of the Transfer of Property Act, 1882.

In such a case the mortgagee is entitled, on the expiry of the term, to sue for the mortgage money irrespective of whether the security has been rendered insufficient or the mortgagee has lost possession of the mortgaged property.

Ram Narayan Singh v. *Adhindra Nath Mukherji* (1), *Parbati Charan Roy* v. *Gobinda Chandra Kundu* (2), *Ethel Georgina Kerr* v. *Clara B. Burton* (3) and *Hikmatullah Khan* v. *Imam Ali* (4), referred to.

Appeal by the plaintiff.

This appeal arose out of a suit on the basis of a mortgage bond, dated the 8th April, 1919, for the principal sum of Rs. 1,000. The bond was executed by the defendant no. 1, who was the father of the defendants 2 to 4 and 6 and the grandfather of the defendant no. 5. The property mortgaged was a house in the town of Chapra. The bond recited the existence of a prior debt due to one Ram Narain Sahu amounting to Rs. 800 which was carrying interest and had on the date of the bond in suit come up to Rs. 914 on account of principal with interest, and the reason of execution of the bond in suit was stated to be that the interest on the previous bond was increasing and unless that bond was paid the property was in danger of being lost. The operative part of the bond runs thus:

"Therefore, I, of my own free will and accord, in sound state of my body and mind, without pressure and coercion on the part of anyone else, at the advice of my well-wishers and relatives, have executed a zarpeshgi deed for a term of three years extending from the month of Chait 1326 Fs. to the month of Chait 1329 Fs. in respect of the two-storeyed brick built house covered with tiles with pacca walls, facing

(1) (1917) I. L. R. 44 Cal. 388, P. C.

(2) (1906) 4 Cal. L. J. 246.

(3) (1906) 4 Cal. L. J. 510.

(4) (1890) I. L. R. 12 All. 203.

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the east, situate in mahalla Sahebgunj, one of the quarters of the town of Chapra, district Saran, bearing ward no. 2, circle no. 14, municipal no. 629, including the inner and outer lands together with all materials, with threshold, door leaves, viz., all materials appertaining thereto, in lieu of Rs. 1,000 in current coin, half of which is Rs. 500 of the said coin, in favour of Chhati Lal Sahu, son of Raghunandan Sahu, deceased, by caste a Kalwar, by occupation a money-lender carrying on an arath business, resident of mahalla Sahebganj, pargana Manjhi, one of the quarters of the town of Chapra, district Saran, and have put him in possession of the zarpeshgi property. I do make trustworthy declaration and give out in writing that the said zarpeshgidar having entered upon possession of the zarpeshgi property shall retain possession thereof or let out the same on rent to anyone else or take such action as he likes till the term of the zarpeshgi..... I do further declare and give out in writing that the said zarpeshgidar shall continue to spend money out of his own pocket in paying the municipal tax and rent to the proprietor and in repairing the house annually, without any objection. If the said house be demolished and in consequence thereof any of its walls becomes damaged, in that case, the construction of the demolished wall shall rest with me, the declarant..... Therefore on the receipt of the whole and entire zarpeshgi consideration money, I have given these few words in the form of a zarpeshgi deed in writing for a term of three years so that it may be of use when required."

The plaintiff's case was that subsequent to the execution of the bond in suit the defendant no. 1 gave a chithi, dated the 15th April, 1919, to the plaintiff undertaking to repair the northern wall of the house which was found cracked and in a dangerous condition and that, in case the defendant failed to repair the wall, the plaintiff was to get the repair done by himself and to realise the money so spent from the defendant; that the defendant failed to repair the wall in spite of repeated demands, and another wall also cracked and the house became unfit for habitation; and that on account of other defects in the house it had become unfit to be used as a dwelling-house; that the plaintiff thereupon demanded payment of the money by the defendant, but the defendant neither made any payment nor got the house repaired; that a notice was served upon the defendant through a pleader and on the 16th April, 1920, the defendant no. 1 paid a sum of Rs. 100 to the plaintiff promising to pay the balance required for carrying out the repairs, but in spite of repeated demands no further payment was made and the plaintiff again served the defendant with a notice;

but neither was the mortgage money paid nor was the house repaired. A third notice was served demanding further sufficient security, but the defendant failed to give any sufficient security. The suit was accordingly instituted for recovery of the principal amount with interest, and one of the causes of action stated in the plaint was the expiry of the due date of payment on the 1st of Baisakh, 1329 Fasli; and the plaintiff prayed for a mortgage decree under Order XXXIV, rule 4, of the Code of Civil Procedure and further incidental reliefs.

The suit was contested by the defendant no. 1 as well as by his sons and grandson. The defence of the defendant no. 1 was that the plaintiff had no cause of action for the suit; that under the terms of the bond the plaintiff had to repair the house and that he deliberately abstained from making the necessary repairs with the result that the house is now in a dilapidated condition; that it was agreed between the parties that the defendant would pay Rs. 100 to the plaintiff and that the plaintiff would spend the remaining amount necessary for the repairs from his own pocket; but although the defendant paid the plaintiff Rs. 100 he did not get the house repaired. The defendant denied writing the chithi, dated the 15th April, 1919, and he alleged that the plaintiff was entitled to no interest on the mortgage money as he was still in possession of the house. The other defendants raised the question that the loan was not contracted for family necessity and that they were not bound to pay the same.

The Munsif found that the mortgage was a usufructuary mortgage and there was no stipulation that the money would be repaid either on demand or on the expiry of the term; that the plaintiff could not sue for the money unless he had been dispossessed from the mortgaged property or unless the security had become insufficient through the fault of the mortgagor or due to other causes. He found that the security had

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not become insufficient, inasmuch as, although the house was out of repairs, yet the value in its present condition was at least Rs. 1,500 and was therefore a sufficient security for the loan advanced. He found that the loan had been advanced for family necessity and that the defendants nos. 2 and 6 were benefited by the mortgage money and they were liable to pay the debt; but he dismissed the suit on the finding that the plaintiff had no cause of action and that the suit was not maintainable.

On appeal the Subordinate Judge came to the following findings:

(1) That the defendant no. 1 did execute the mortgage bond in suit in favour of the plaintiff for Rs. 1,000.

(2) That the mortgage was for an antecedent debt to the extent of Rs. 914 and was binding on the joint family to that extent; but that for the balance of Rs. 86 there was no necessity shown and that for this sum the plaintiff was entitled only to a money decree, inasmuch as the loan was contracted by the father and it was not shown that it was for immoral purposes.

(3) That the plaintiff was not entitled to sue for the mortgage money.

The Subordinate Judge accordingly dismissed the appeal and affirmed the decree of the Munsif.

Khurshaid Husnain and *Syed Ali* Khan, for the appellant.

H. P. Sinha, for the respondents.

KULWANT SAHAY, J. (after stating the facts set out above, proceeded as follows:) The principal point for consideration in the present appeal by the plaintiff is whether the plaintiff is entitled to sue for the mortgage money. This will depend on a finding as to the true nature of the bond in suit. It is contended on behalf of the defendants-respondents that as the mortgage in suit is a usufructuary mortgage and it has been found that the security had not been rendered insufficient and that the mortgagee was still in possession of the mortgaged property, the plaintiff was not entitled to sue for the mortgage-money. On the other

hand, it is contended on behalf of the appellant that the bond in suit is not a usufructuary mortgage as defined in section 58(*d*) of the Transfer of Property Act. The material portion of the bond in suit has been set out above. It purports to be a zarpeshgi deed for a term of three years extending from the month of Chaitra 1326 to the month of Chaitra 1329 Fasli. It is stipulated therein that the mortgagee shall retain possession thereof till the term of the zarpeshgi which has specifically been fixed to be for three years. There is no provision in the bond that after the expiry of the term of three years the mortgagee will be entitled to retain possession of the mortgaged property until the repayment of the mortgage money. The definition of a usufructuary mortgage as given in clause (*d*) of section 58 of the Transfer of Property Act is

"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."

The essential condition is that the mortgagee is authorised to retain possession of the mortgaged property until payment of the mortgage-money. In the bond in suit no such authority is given to the mortgagee. The bond expressly states that the mortgage was for a term of three years and the mortgagee was to retain possession of the mortgaged property for a term of three years only. It is thus clear that the bond in suit cannot be treated as a usufructuary mortgage so as to disentitle the plaintiff to sue for the mortgage-money. It is true that there is no express covenant on the part of the mortgagor to repay the mortgage-money, but such a covenant must be implied in every transaction of loan and whenever a person borrows money the borrower must be deemed to have entered into an implied contract to repay the money borrowed. The plaintiff must, therefore, be

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held to be entitled to sue for the mortgage-money on the implied contract to repay. When the mortgage does not come strictly within the definition of a usufructuary mortgage we have, under section 98 of the Transfer of Property Act, to determine the rights and liabilities of the parties by their contract as evidenced in the mortgage deed. On a true construction of the mortgage deed I am of opinion that the plaintiff is entitled to sue for the mortgage-money on the implied contract to repay. A reference has been made by the learned Advocate to the case of *Ram Narayan Singh* v. *Adhindra Nath Mukherji* (1). Their Lordships of the Privy Council had in that case to consider whether on the terms of the deed before them it was intended that the mortgagor was personally liable. Their Lordships held that on the terms of the deed the mortgagor was not personally liable. Their Lordships, however, in the course of their judgment observed as follows :—"In considering this question it must be borne in mind (*i*) that a loan prima facie involves such a personal liability, (*ii*) that such a liability is not displaced by the mere fact that security is given for the repayment of the loan with interest but (*iii*) that the nature and terms of such security may negative any personal liability on the part of the borrower. It must also be borne in mind that even if the mortgagor be in the first instance under no personal liability, such liability may arise under section 68(*b*) or (*c*) of the Transfer of Property Act."

In *Parbati Charan Roy* v. *Gobinda Chandra Kundu*(2) it was held that every mortgage contains within itself, so to speak, a personal liability to repay the amount advanced; in other words, where there is in a mortgage nothing to the contrary, there is an implied promise to pay presumed in law, from the fact of the acceptance of the loan, the mortgage merely

(1) (1917) I. L. R. 44 Cal. 888, P. C.
(2) (1906) 4 Cal. L. J. 246.

giving the mortgagee an additional security in the shape of the pledged property. The same view was expressed in *Ethel Georgina Kerr* v. *Clara* B. *Ruxton*(1). In *Hikmatullah Khan* v. *Imam Ali*(2) the terms of the mortgage were somewhat similar to the terms of the bond in suit before us. The mortgage was for four years and there was no stipulation in terms that the mortgagee was to remain in possession until the payment of the mortgage-money, and it was held that the instrument did not strictly fall within section 58(*d*) of the Transfer of Property Act. The cases referred to on behalf of the respondents are not of any assistance in the present case, inasmuch as in all those cases it was held that under the terms of the bond the mortgagee was entitled to retain possession until repayment of the principal money.

I am, therefore, of opinion that apart from the question whether the security has been rendered insufficient or the mortgagee has lost possession of the mortgaged property, the plaintiff is entitled to sue for the mortgage-money after the expiry of the terms which in the present case has admittedly expired.

The next question is what should be the form of the decree in the present case. The findings of the learned Subordinate Judge are that all the defendants are liable for the mortgage-money, and it has been found that under the terms of the mortgage bond the plaintiff was bound to keep the house in good repair and that on account of his negligence or wilful abstention from carrying out the necessary repairs the house has now fallen into a dilapidated condition; and that a sum of Rs. 100 was paid by the defendant no. 1 to the plaintiff for making necessary repairs, but this amount was not spent by him. Having regard to the terms of the bond and the findings of the Courts below, I am of opinion that the defendants

(1) (1906) 4 Cal. L. J. 510.
(2) (1890) I. L. R. 12 All. 203.

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are entitled to get back their property in the condition in which they gave it to the plaintiff, subject to the ordinary wear and tear. It has been found that the defendants were not liable to repair the wall, but it appears that the defendants did admit their liability to make some repairs when they paid the sum of Rs. 100 to the plaintiff. Under the terms of the bond the defendants had to repair the wall if it fell down under certain conditions. An inquiry should, therefore, be made to determine to what extent the plaintiff is liable to repair the house and what portion of the repairs should be done by the defendants themselves. The liabilities of the parties in this respect will be determined after such inquiry by the Court below, and a decree will be made in favour of the plaintiff for such amount as he may be deemed entitled to get after setting off such sums as may be found due from him for carrying out the necessary repairs.

The decree of the learned Subordinate Judge must, therefore, be set aside and the case remanded to him for disposal according to the directions given above. Costs will abide the result.

MACPHERSON, J.—I agree.

Case remanded.

APPELLATE CIVIL.

Before Kulwant Sahay and Macpherson, JJ.

URMILA DASI

v.

TATA IRON AND STEEL COMPANY.*

1928.

June, 5.

Workmen's Compensation Act, 1923 (*Act VIII of* 1923), *sections* 3(*1*)(*b*) (*ii*) *and* 30—*proceedings under the Act nature*

*Miscellaneous Appeal no. 155 of 1927, from an order of W. W. Dalziel, Esq., Commissioner under the Workmen's Compensation Act, Jamshedpur, dated the 18th May, 1927.