APPELLATE CIVIL.

Before Harrison and Dalip Singh JJ.

PARS RAM-JAISHI RAM (PLAINTIFFS) Appellants

versus

BRIJ MOHAN LAL AND OTHERS (DEFENDANTS) Respondents.

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April 23.

Civil Appeal No. 2310 of 1929.

Mortgage (usufructuary)—personal liability of mortgagor —existence of—express or by implication. Interpretation of deed—principles discussed. Transfer of Property Act, IV of 1882, sections 58, 68.

Held (following *Ram Narain Singh* v. *Adhindra Nath* (1) that in all mortgages a personal covenant to repay the mortgage money must be presumed unless there is something in the nature and the terms of the mortgage deed to negative it. Two of the kinds of mortgages enumerated in section 58 of the Transfer of Property Act, *viz.* a simple mortgage and an English mortgage, necessarily connote that the mortgagor binds himself to repay the mortgage money. If, therefore, at any time a Court comes to the conclusion that the mortgage is either a simple mortgage or an English mortgage, it necessarily follows that it has already decided that the mortgagor is personally liable to repay the mortgage money. In four other forms, namely, (1) mortgage by conditional sale, (2) usufructuary mortgage, (3) mortgage by deposit of title deeds, and (4) anomalous mortgage, the Court would not necessarily come to any conclusion by deciding the nature of the deed, as to whether there was or was not a personal liability. The nature of the deed may either raise a presumption for, or a presumption against, the interpretation of the terms, which might otherwise be ambiguous, in favour of or against a personal covenant to pay; but a personal covenant to pay may be express or may be implied in all mortgages whatsoever of any form. The only difference that can arise is that in certain forms of mortgages the Court might, in the absence of an express covenant, demand a much more clearly implied cove-

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

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nant than it might require in other cases. This would particularly be the case in a usufructuary mortgage.

Narotam Dass v. *Sheo Pargash Singh* (2), explained.

And, that even assuming the deed in the present case to be an usufructuary mortgage, the words "the mortgagees shall be competent to recover the same in any way they like" in the deed meant that the mortgagees could recover it also from the person and *other* property of the mortgagor.

First appeal from the decree of Lala *Gulwant Rai, Senior Subordinate Judge, Ludhiana, dated the 29th July 1929, directing that the defendants do pay (personally) to the plaintiffs the sum of Rs. 6,892.*

JAGAN NATH AGGARWAL, ASA RAM AGGARWAL and D. R. SAWHNEY, for Appellants.

BADRI DAS, NAWAL KISHORE, and AJIT PARSHAD, for Respondents

DALIP SINGH J.

DALIP SINGH J.—Plaintiffs in this case brought a suit against the representatives of the original mortgagor for mortgage money and interest secured by a mortgage deed, dated the 12th of April 1921, printed at pp. 47-49 of the paper book. They obtained a final decree and put the mortgaged property to sale and then applied under Order XXXIV, rule 6, for a personal decree against the representatives of the original mortgagor for the short fall. They alleged that the defendants were members of a joint Hindu family with the deceased mortgagor and were therefore personally liable for the payment of this balance and that the decree holders were entitled to realise this balance from the moveable and immoveable property and persons of the judgment-debtors. The defendant Brij Mohan Lal appeared and stated that the defendants were not liable personally, nor was their property

(1) (1884) I. L. R. 10 Cal. 740 (P.C.).

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liable, that the original mortgagor, their father, was also not personally liable, that they had got very little property from their father and that they had disposed of it to discharge the liabilities of their father.

Upon the pleadings of the parties certain issues were framed by the trial court, but the issue really in dispute was whether the mortgagor was personally liable under the mortgage deed, and as a subsidiary to this, whether the defendants were personally liable for a portion of the amount claimed, namely, the rent of the mortgaged property which had been in their possession.

The trial Court held that the mortgagor was not personally liable on the mortgage and that the only remedy of the plaintiffs for the mortgage money and interest was against the property mortgaged. It held, however, that the mortgagor and the defendants were personally liable as tenants to pay all the arrears of rent under a rent deed of the 26th of April 1921. It accordingly gave a decree to the plaintiffs holding the defendants personally liable for Rs. 6,892 on account of rent from the 12th of April 1924 till 16th of November 1928 at Rs. 1,500 *per annum*. The minor defendants were not to be liable to arrest until they attained majority. In giving a personal decree against the defendants it took into account the admission of Brij Mohan Lal, defendant, that he had taken possession of cloth worth Rs. 20,000, lying in the shops and left by their father. It directed the parties to bear their own costs of the application.

Both sides have appealed, the mortgagees claiming that the morgagor was personally liable for the full mortgage money and the defendants claiming that they were not liable personally at all for the amount given by the Court below.

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In arguments before us it was conceded that if this Court held that the mortgagor was personally liable for the full amount of the mortgage money, then the plaintiffs should be allowed a decree against the legal representatives of the mortgagor, namely, the present defendants, for the full amount of the mortgage money to be recovered from the entire estate left to them by their father which was in their possession, unless they could duly account for its disposal and that the defendants could not be held personally liable for the rent as allowed by the trial Court. The only question, therefore, that has to be decided is whether on a proper construction of the mortgage deed it should be held that the mortgagor was personally liable to pay the full amount or whether the mortgagees could look only to the property.

In this connection the learned counsel for the plaintiffs has cited *Chhathi Lal Shah* v. *Bindeshwari Prasad* (1), *Ram Narain Singh* v. *Adhindra Nath* (2), *Hikmatullah Khan* v. *Imam Ali* (3), *Atma Ram* v. *Surjan* (4), *Parbati Charan Roy* v. *Gobinda Chandra* (5), *Ethel Georgina Kerr* v. *Ruxton* (6) and *Bhugwan Das* v. *Parmeshwari Prasad Singh* (7). He has also contended on the terms of the mortgage deed that the interest payable was Rs. 1,500 *per annum* for the first five years of the mortgage though it is called rent. It was realisable " in any way they liked " by the mortgagees. He, therefore, contends that there was a personal liability to pay interest. He then contends that there was a definite covenant to pay contained in the words " The agreement is that I will pay the mort-

(1) (1929) I. L. R. 8 Pat. 16.
(2) (1917) I. L. R. 44 Cal. 388 (P.C.).
(3) (1890) I. L. R. 12 All. 203.
(4) (1928) 10 Lah. L. J. 198.
(5) (1906) 4 Cal. L. J. 246.
(6) (1906) 4 Cal. L. J. 510.
(7) (1907) 5 Cal. L. J. 287.

gage money with interest within a period of five years and redeem the mortgaged property." He further contends that there is a clause empowering the mortgagor to sell the property within the period of five years, and that if he does so the whole of the sale proceeds shall be paid to the mortgagees. He argues from this clause that the mortgagor could reduce the property by sale and that therefore the mortgagee was not confined to the property mortgaged. He then relies on the words " After the expiry of the fixed period of five years the mortgagee shall be competent in every way to recover the mortgage money and interest at any time" (I have slightly changed the clause as printed because the vernacular is more correctly represented by my translation). He also relies on the clause " I and my representatives will have no objection because I have mortgaged the property for the benefit of the joint Hindu family." He contends that this could only refer to the other property of the joint Hindu family because the present property was recited to be the exclusive separate property of the mortgagor. He has also relied on *Askaran Baid* v. *Gobordhan Kobra* (1), *Balam Nookamma* v. *Sadireddi Dharmayya* (2) and on *Dattambhat Rambhot* v. *Krishnabhat* (3) and *Jag Sahu* v. *Mst. Ram Sakhi* (4) for the proposition that a mortgage is not usufructuary if a term is fixed after which the mortgagor becomes liable to pay. He has relied on *Phul Kuar* v. *Murli Dhar* (5) where a majority of the Judges held on a mortgage, which is more nearly similar to the present one than any other, that the mortgage is really a simple mortgage. He contends that the possession did not really pass from

(1) (1921) 26 Cal. W. N. 318. (3) (1910) I. L. R. 34 Bom. 462.
(2) 1928 A. I. R. (Mad.) 233. (4) (1922) I. L. R. 1 Pat. 350.
(5) (1880) I. L. R. 2 All. 527.

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the mortgagor because the lease of the mortgaged property must be held to be one transaction and that, therefore, the mortgage being a simple mortgage implied a covenant to pay.

On the other hand the learned counsel for the respondents contends that personal liability only arises under section 68 of the Transfer of Properety Act if the mortgagor *expressly* covenants to pay, that the prior existing debt for which the mortgage was created was intended to be discharged by the mortgage, relying on the following sentences : " At present there are no means of paying off the said debt. It has become difficult to get the goods for trade business until the debt due by me is paid off in cash or by means of mortgage of the immoveable property." He contends that the mortgage was with possession and that throughout the term of the mortgage the mortgagees were to be in possession. He relies on the sentence " The condition is that the mortgaged property shall remain in the possession of the mortgagees." There are no limiting words. He, therefore, contends that the term of the possession continued while the mortgage continued. He also relies on the clause " In case of any additions made by the mortgagees they shall be entitled to recover the costs with interest at the rate of annas eight *per cent. per mensem* from the mortgaged property." He contends also that there was no meaning in the indemnity clause if there was personal liability implied in the present mortgage. He relies on the clause " If the contrary be proved (*i.e.* if the property is not unencumbered) the mortgagees shall be competent to recover forthwith the mortgage money and interest from my person, the property mortgaged and my other property of every description regardless of any term." He contends that the expression " I will pay " in the

clause relied on by the counsel for the plaintiffs is only an expression of intention to pay or the fixing of a term after which or within which payment becomes due and not an undertaking to pay.

For the contention that section 68 means that there must be an express covenant to pay, he relies on *Govind* v. *Jagannath* (1) and *Harlalsa* v. *Shaikh Rahim* (2), rulings of the Nagpur Judicial Commissioners, and *Narotam Dass* v. *Sheo Pargash Singh* (3), *Bunseedhur* v. *Sujaat Ali* (4) and *Ram Narain Singh* v. *Adhindra Nath* (5), and the interpretation given to that ruling in Gour's Transfer of Property Act. For the contention that the promise to pay within a period is not sufficient to ensure personal liability, he relies on *Nazim Husain* v. *Mahabir Prasad* (6) and *Shiam Sundar* v. *Dilganjan Singh* (7) of the Oudh Chief Court. He also relies on *Chundam Veettil* v. *C. P. M. Muhamad* (8) and *Pell* v. *Gregory* (9). He contends that *Chhathi Lal Shah* v. *Bindeshwari Prasad* (10) and *Hikmatullah Khan* v. *Imam Ali* (11) are not in point, for there it was found that the mortgages were not usufructuary mortgages, that *Phul Kuar* v. *Murli Dhar* (12) is a ruling before the Transfer of Property Act, that the clause referring to the sale proceeds of the property means sale proceeds of the equity of redemption and is a clause in favour of the mortgagees and not of the mortgagor. He interprets the words " in every way " to mean " all legal methods open to the mortgagees subject to the terms of the deed."

(1) (1916) 33 I. C. 753.
(2) (1922) 70 I. C. 224.
(3) 1884) I. L. R. 10 Cal. 740 (P.C.).
(4) (1889) I. L. R. 16 Cal. 540.
(5) (1917) I. L. R. 44 Cal. 388, 400
(6) (1915) 30 I. C. 224.
(7) (1917) 39 I. C. 540.
(8) (1914) 24 I. C. 127.
(9) (1925) I. L. R. 52 Cal. 828, 843.
(10) (1929) I. L. R. 8 Pat. 16.
(11) (1890) I. L. R. 12 All. 203.
(12) (1880) I. L. R. 2 All. 527.

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After considering all the arguments for and against advanced by the learned counsel on both sides, it seems to me that their Lordships of the Privy Council in *Ram Narain Singh* v. *Adhindra Nath* (1) have laid down the law as follows :—At p. 400, their Lordships, in dealing with the question whether there was any personal liability on the part of the mortgagor for payment of a portion of the loan and interest which remained unsatisfied out of the rents of the property mortgaged, hold as follows :—" In considering this question it must be borne in mind (1) that the loan *primâ facie* involves such a personal liability; (2) that such a liability is not displaced by the mere fact that security is given for the repayment of the loan with interest, but (3) that the nature and terms of such security may negative any personal liability on the part of the borrower." At p. 401 their Lordships stated " The Board were of opinion that having regard to the nature of the deed of the 14th April 1896 which was a usufructuary mortgage only and to its terms, any personal liability on the part of the mortgagor was excluded." As I understand their Lordships, it would follow that in all mortgages a personal covenant to repay the mortgage money must be presumed unless there is something in the nature and the terms of the mortgage deed to negative it. So far as the question of terms is concerned there would be no difficulty in interpreting this but the difficulty arises as to the precise meaning of the words " nature of the deed." In the Transfer of Property Act in section 58 six kinds of mortgages are enumerated. Two of these, namely, a simple mortgage and an English mortgage, necessarily connote that the mortgagor binds himself to repay the mortgage money. If, therefore, at any time

(1) (1917) I. L. R. 44 Cal. 388, 400, 401 (P.C.).

a Court comes to the conclusion that the mortgage is either a simple mortgage or an English mortgage, it necessarily follows that it has already decided that the mortgagor is personally liable to repay the mortgage money. In four other forms, namely (1) mortgage by conditional sale, (2) usufructuary mortgage, (3) mortgage by deposit of title deeds and (4) anomalous mortgage, the Court would not necessarily come to any conclusion by deciding the nature of the deed as to whether there was or was not a personal liability. Section 68 lays down that the mortgagee has a right to sue for the mortgage money in the following cases and no others, namely (*a*) whether the mortgagor binds himself to repay the same (the other clauses need not be mentioned here). It has been contended that this clause implies that there must be an express personal covenant to pay, but I find that in *Ram Narain Singh* v. *Adhindra Nath* (1), where section 68 was expressly brought to the attention of their Lordships, they did not proceed to lay down any such proposition and merely stated the law as has been mentioned above. I conclude, therefore, that the law is that the nature of the deed may either raise a presumption for or a presumption against the interpretation of the terms which might otherwise be ambiguous in favour of or against a personal covenant to pay, but that a personal covenant to pay, may be express or may be implied in all mortgages whatsoever of any form. The only difference that can arise would be that in certain forms of mortgages the Court might, in the absence of an express covenant, demand a much more clearly implied covenant than it might require in other cases. This would particularly be the case in an usufructuary

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

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mortgage. I do not see that *Narotam Dass* v. *Sheo Pargash Singh* (1) laid down anything to the contrary. Their Lordships appear to me in that decision to have relied on the mode of payment provided in the deed itself as negativing the idea of personal liability, and their Lordships did not hold that a clause similar to the following, namely " I will pay the mortgage money " does not amount in all cases to a covenant of personal liability to pay.

Considering then the present deed and taking the most favourable construction for the defendants, the mortgagor's representatives, and assuming that the deed is an usufructuary mortgage, I would still hold that the deed clearly implies a personal covenant to pay and I would go further and hold that it contains an express covenant to pay. In the first place, it is clear that the interest for the first five years amounting to Rs. 1,500 *per annum* could be recovered in any way the mortgagees liked. A separate suit could be brought for it and I am unable to hold, and it was not contended by the learned counsel for the defendants, that this suit had to be for the sale of the mortgaged property. I conclude therefore that the words " the mortgagees shall be competent to recover the same *in any way they liked* " in this deed, meant that the mortgagees could recover it from the person and other property of the mortgagor. This being the case, I fail to see why the very similar words " the mortgagees shall be competent *in every* way to recover the mortgage money and interest at any time " should be limited to recover it from the mortgaged property alone. The indemnity clause, in my opinion, lays stress on the word " forthwith " and not on the words " my person

(1) (1884) I. L. R. 10 Cal. 740 (P.C.).

and my other property." This is strengthened by the inclusion of the words " the property mortgaged " in the indemnity clause. Further, the fact that there was a pre-existing liability for which the mortgagor would have been personally liable, to my mind tends to show that the parties intended personal liability to continue in the absence of express words to the contrary. Further, the fact that the interest after five years was raised from $2\frac{1}{2}$ *per cent. per annum* to eight annas *per cent. per mensem*, and that interest at $2\frac{1}{2}$ *per cent. per annum* only balanced the rent realisable from the property would tend to show that other property and the person of the mortgagor was also liable after five years for the enhanced interest. Further, I do not think that the clause referring to the mortgagor's right to sell any portion of the property refers to sale of the equity of redemption. It seems to me that the words purport to mean, that any portion of the property could be sold by the mortgagor and the property mortgaged reduced by that extent, provided the sale-proceeds were paid to the mortgagees. To secure prevention of fraud in this connection the title deeds of the property were handed over to the mortgagees.

For all these reasons I am of opinion that the mortgagor is personally liable on the mortgage contract. I would, therefore, accept the appeal of the plaintiffs and give them a personal decree against the defendants as representatives of the mortgagor to the extent of all the property of the mortgagor which has come into their possession at any time unless duly accounted for. The expression " property of the mortgagor " will include both his separate property and property belonging to the joint Hindu family consisting of the mortgagor and the present defendants. I

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would also accept the appeal of the defendants and hold that they are not personally liable for the rent as decreed by the trial Court. The appeals of both parties are accordingly accepted and each party will get his costs of his appeal.

DALIP SINGH J. HARRISON J.—I agree.

N. F. E.

Appeals accepted.

SPECIAL BENCH.

Before Harrison, Jai Lal and Bhide JJ.

LABH SINGH ETC., Petitioners

versus

MEHR SINGH AND OTHERS, Respondents.

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Oct. 16.

Civil Reference No. 4 of 1931.

Indian Stamp Act, II of 1899, Schedule 1, Article 3—Document primarily a deed recording an adoption and not a mere will—" recording "—meaning of.

The question in a reference made under section 60 of the Indian Stamp Act, was whether the document tendered by the defendant was liable to duty under the Stamp Act, as a deed of adoption, or whether it should be treated as a will which merely incidentally recited the factum of adoption. The document began by reciting the factum of adoption. It went on to say that no document was executed at the time or subsequently and therefore the document in question was executed to affirm the adoption. Then followed the recital of the consequences of that adoption—" that the adopted son shall perform the ceremonies customary after death and that he shall become the owner of all the property of his adoptive father;" and the deed ended—" Hence this deed of adoption is executed."

Held, that the document in question was liable to stamp duty as a deed of adoption, it being primarily a deed recording an adoption within the meaning of Article 3 of Schedule 1 the Indian Stamp Act.