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RAM MAL  
v.  
MST. SITA BAI.

ADDISON J.

For the reasons given there can be no doubt that the judgment of the trial Court is correct and that there was a final partition of the house property in the lifetime of the plaintiff's husband. She is thus entitled to succeed to her husband. The suit as regards the house property was properly decreed and I would dismiss this appeal with costs.

BHIDE J.

BHIDE J.—I agree.

A. N. C.

*Appeal dismissed.*


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**APPELLATE CIVIL.**
*Before Addison and Bhide JJ.*

MAHESHA MAL AND ANOTHER (PLAINTIFFS)

Appellants

*versus*

GOPAL, ETC. (REPRESENTATIVES OF NATHA MAL,  
DECEASED) AND ANOTHER (DEFENDANTS) Respondents.

Civil Appeal No. 901 of 1929.

*Mortgage — Foreclosure — Regulation XVII of 1806 — whether applicable to mortgage rights in the Punjab—Punjab General Clauses Act, I of 1898—Transfer of Property Act, IV of 1882, Section 58.*

*Held*, that mortgage rights in land fall within the definition of immoveable property in the Punjab (*vide* Punjab General Clauses Act, 1898) and therefore Regulation XVII of 1806 applies to a mortgage of mortgage rights.

*Mela Mal v. Mela Mal* (1), dissented from.

*Allah Ditta v. Nazar Din* (2), *Phullo v. Mst. Dakhan* (3) and *Gehna v. Sohan Lal* (4), relied upon.

*First appeal from the decree of Mr. K. C. Janmeja, Senior Subordinate Judge, Ferozepore, dated the 10th January, 1929, dismissing the plaintiff's suit.*

(1) 88 P. R. 1888.

(3) (1926) I. L. R. 7 Lah. 273.

(2) 53 P. R. 1916 (F.B.).

(4) 11 P. R. 1904.

J. L. KAPUR, for Appellants.

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JAGAN NATH, AGGARWAL, and ASA RAM AGGAR-  
WAL, for Respondents.

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ADDISON J.—The two plaintiffs have brought this suit against Natha Mal, defendant 1, and Tara Chand, defendant 2. On the 22nd May, 1914, Natha Mal executed a simple mortgage deed for Rs. 7,000 with respect to certain house property in favour of Tara Chand. Interest was fixed at 6 per cent. per annum, but was to be compounded monthly in case of default. On the 19th December, 1914, Tara Chand mortgaged his mortgage rights in the property with possession to the plaintiffs for Rs. 4,000 by way of conditional sale. The rent realizable by the plaintiffs was to take the place of interest which was not otherwise fixed. It is not explained in this document (nor was it explained at the trial) how this mortgage purported to be with possession. Tara Chand's own mortgage being a simple mortgage. Under Regulation XVII of 1806 the plaintiffs gave notice to Tara Chand through the Court of the District Judge that they intended to foreclose their sub-mortgage. Notice issued on the 6th March, 1923, and was served on the 27th March, 1923. On the 4th April the District Judge consigned the proceedings to the record room as being complete.

Thereupon on the 5th June, 1928, the plaintiffs instituted this suit. It is headed as a claim for recovery of Rs. 8,000, principal and interest, on the basis of the first mortgage in favour of Tara Chand by Natha Mal, dated the 22nd May, 1914, as well as on the sub-mortgage of the 19th December, 1914. The relief asked for was that the property in question

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should be sold for recovery of the sum named which was arrived at as follows:—

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	Rs.
Principal mortgage money as given in the original mortgage ...	7,000
Interest till date of suit ...	5,600
	_____
Total ...	12,600

Deduct :

	Rs.
Money received towards interest	1,600
Interest remitted ...	3,000
	_____
	4,600
	_____
Net balance ...	8,000

Reference was then made to the foreclosure proceedings in connection with the sub-mortgage and it was claimed that by reason thereof the plaintiffs had become full owners of the mortgage rights of Tara Chand and entitled to sue on his original mortgage deed. This is the sole cause of action stated, and it was claimed that a decree for Rs. 8,000 be given and if it was not paid the property should be sold to satisfy the claim of the plaintiffs.

Natha Mal denied that the plaintiffs had acquired the status of being owners of the mortgage rights of Tara Chand. He further pleaded that he had paid Rs. 3,000 to Tara Chand. This may explain why the plaintiffs remitted the sum of Rs. 3,000. Tara Chand pleaded that the plaintiffs had never made any demand from him, and that the foreclosure proceedings were irregular and illegal. The trial Judge held that no notice of demand was given by the plaintiffs to Tara Chand prior to the notice

under the Regulation, that there was no reference to section 7 in the notice which the Court issued in the proceedings for foreclosure and that the exact sum was also not mentioned in that notice. He accordingly held that the foreclosure proceedings were irregular, illegal and of no avail. It was conceded before us that this finding is correct and must stand.

I was then contended before the trial Judge on behalf of the plaintiffs that mortgage rights in property were incorporeal rights and that Regulation XVII of 1806 did not apply. The Judge pointed out that this position was inconsistent with the plaint and he has refused to listen to it on the ground that a party should not be allowed to change his position arbitrarily. Finally he held that as plaintiffs had failed to establish that they stood in the shoes of the original mortgagee and as there was no privity of contract between them and defendant 1, a suit for sale of the property could not be brought and he therefore dismissed it, leaving the parties to bear their own costs. Against this decision the plaintiffs have appealed.

It was held in *Mela Mal v. Mela Mal* (1), that the assignment of a mortgage did not come within the regulation in question as such an assignment was of incorporeal rights. This seems to me to be wrong. In the Punjab General Clauses Act, I of 1898, "immoveable property" is defined as including land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth. In section 58 of the Transfer of Property Act, a mortgage is defined as the transfer of an interest in specific immoveable property for the

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purpose of securing the payment of money advanced or to be advanced by way of loan. It was not, however, till the Full Bench case, *Allah Ditta v. Nazar Din* (1), that this definition of a mortgage was accepted in the Punjab. Since then mortgage rights in land have been held to fall within the definition of immoveable property, that is, land [see *Phullo v. Mst. Dakhan* (2)]. Even in 1904 it was held [see *Gehna v. Sohan Lal* (3)], that the word "land," as defined in the Punjab Alienation of Land Act included occupancy rights in land, that is, occupancy rights were considered to be an interest in land. In fact the so-called proprietor and the occupancy tenant together are the owners of the land just as the mortgagor and the mortgagee together are the owners of the land. It follows that Regulation XVII of 1806 is applicable and that as the foreclosure proceedings under the Regulation were defective the plaintiffs have not acquired the rights of the original mortgagee, Tara Chand.

Thus the suit must fail as it was brought on this basis alone and was for the sale of the immoveable property to satisfy the original mortgage. Counsel for the plaintiffs-appellants, has asked that he should be allowed to amend his plaint even at this stage so as to sue on his sub-mortgage. There is no prayer in the grounds of appeal to this effect and, in my judgment, not only is it too late in the day to allow this amendment, but the amendment must be refused on the ground that the cause of action would be totally different. The new cause of action would be on the sub-mortgage of the 19th December 1914. That purports to be a sub-mortgage with possession. Ordinarily

(1) 53 P. R. 1916 (F.B.). (2) (1926) I. L. R. 7-Lah. 273. ...

(3) 11 P. R. 1904.

speaking, therefore, if the plaintiffs are without possession, as they appear to be, their suit should be for possession of the mortgage rights of Tara Chand, though he only holds a simple mortgage. Or it may be that they can sue for the sale of Tara Chand's mortgage rights. Again, no interest is provided for in the mortgage deed as possession is to counter-balance interest. There would thus have to be a trial *de novo* if the amendment were allowed, as many fresh and intricate questions would arise. Further, in such a suit Natha Mal would not be a necessary party. [See *Ram Shankar Lal v. Ganesh Parshad* (1)].

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No other point was argued. For the reasons given I would dismiss the appeal with costs.

BHIDE J.—I agree.

BHIDE J.

A. N. C.

*Appeal dismissed.*

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(1) (1906) I. L. R. 29 All. 385.