

APPELLATE CIVIL.

Before Addison and Din Mohammad JJ.

QADIR PARAST KHAN (PLAINTIFF) Appellant

versus

NUR MOHAMMAD AND OTHERS (DEFENDANTS)

Respondents.

Civil Appeal No. 2151 of 1929.

Mortgage — Anomalous — usufructuary, coupled with promise to pay on certain date — whether mortgagee can sue for recovery of mortgage money—Transfer of Property Act, IV of 1882, section 68 (a)—and whether he has a right to sell the mortgaged land — Punjab Alienation of Land Act, XIII of 1900, section 16.

The defendants entered into an oral mortgage with plaintiff for Rs.10,000, the terms of which were stated by the parties before the *Patwari* in mutation proceedings, and were recorded by him, whereby it was agreed that possession should be with the mortgagee, that interest and produce were to counterbalance each other and that the mortgage money would be paid on the 15th December, 1927, when the land would be redeemed.

Held, that the mortgage was an anomalous mortgage and not a purely usufructuary one, and that therefore under section 68 (a) of the Transfer of Property Act, the mortgagee had a right to sue for the mortgage money, the mortgagors having bound themselves to repay the same.

Held further, that as under the provisions of section 16 of the Punjab Land Alienation Act, the land could not be sold, the mortgagee was entitled to a simple money decree, as prayed for by him.

First Appeal from the decree of Mir Ghulam Yazdani, Senior Subordinate Judge, Multan, dated 18th May, 1929, dismissing the plaintiff's suit.

VAISHNU DATTA, for BADRI DASS, for Appellant.

SHUJA-UD-DIN and ABDUL AZIZ, for Respondents.

The judgment of the Court was delivered by—

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ADDISON J.—The plaintiff sued the three defendants for recovery of Rs.7,200-3-6 on the footing of a mortgage. The principal plea taken by the defendants was that the mortgage was a usufructuary one and that no period for repayment of the money had been fixed. The trial Court held that the mortgage was usufructuary and accordingly dismissed the suit. The plaintiff has appealed.

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The plaintiff sold a large area of land to the defendants for Rs.34,000. Rs.10,000 were not paid and accordingly the defendants mortgaged part of the land to the plaintiff for this outstanding sum of Rs.10,000. Possession was to be given to the plaintiff and the profits of the land were to be taken by him in lieu of interest. Rs.2,800 were later repaid and this explains why the suit is for Rs.7,200-3-6.

The mortgage was an oral one, the intention of the parties being to have a mutation regarding it effected by the revenue authorities, so that the transaction might be embodied in the revenue papers. Accordingly after the oral mortgage the first two defendants and plaintiff went to the *Patwari* or village accountant on the 8th April, 1927, and asked him to record a mutation of the mortgage so that the Assistant Collector might attest it with a view to the transaction being recorded in the revenue papers. The statement of these three persons to the *Patwari*, which is embodied in the mutation, was to the effect that the mortgage was for Rs.10,000; interest and produce were to counterbalance each other; and possession had been given. Finally it was said that the mortgage money would be paid on the 1st of *Poh*, *Sambat* 1984, corresponding to the 15th December,

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1927, when the land would be redeemed. The mutation came before the Assistant Collector on the 9th April, 1927. In his order he stated that the facts in detail with respect to the mortgage had already been entered in the mutation. He then went on to add that the amount was Rs.10,000, the rent and interest being equal. It was because this order did not record the fact mentioned in the parties' statement to the *Patwari* that the mortgage money would be paid on the 15th December, 1927, and the mortgaged area redeemed, that the trial Court held that the mortgage was purely a usufructuary one.

This decision seems to us to be wrong. In the first place, there is no column in the mutation register for the entry of the period of redemption of the mortgage. This, however, was clearly set out in the column of remarks in the mutation entry where the statement of the parties already given was repeated. Though the defendants denied in their pleas that any period for redemption had been fixed, defendants Nos.1 and 2 later admitted as witnesses that they had signed this statement. Further, Ex. P-4 is a letter written by defendant No.1, who is a *Zaildar*, to the plaintiff, bearing date the 19th September, 1928, in which he asked the plaintiff to come on the 15th of *Poh* when he hoped to repay the amount to him. In these circumstances it is clear that one of the terms of this oral mortgage was that the defendants promised to repay the mortgage money on the 15th December, 1927, and to redeem the land. This is thus a case of an anomalous mortgage which used to be called a simple usufructuary mortgage. Under section 68 (a) of the Transfer of Property Act, therefore, the mortgagee has a right to sue for the mortgage money, as the mortgagors bound themselves to repay the same.

Both in the Court below and before us the plaintiff appellant stated that all he desired was a simple money decree against the defendants, and he is certainly entitled to this.

It was held in *Pars Ram-Jaishi Ram v. Brij Mohan Lal* (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. As regards an anomalous mortgage, it was said that 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 could arise was 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 mortgage.

In the case before us, though the mortgage was partly usufructuary, there was an express promise to pay the sum of Rs.10,000 on the 15th December, 1927, and to redeem the land on that date. It might also be added that usually a personal covenant to pay is held to have the effect of implying a right of sale. In the present case the right of sale is not now asked for, for the reason that under the provisions of section 16 of the Land Alienation Act the land cannot be sold in

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execution of any decree. The plaintiff is, however, entitled to give up the security and to obtain a simple money decree for the sum sued for which is not in dispute.

We accordingly accept the appeal with costs throughout and grant the plaintiff a simple money decree against the defendants for the sum of Rs.7,200-3-6.

A. N. C.

Appeal accepted.

APPELLATE CIVIL.

Before Tek Chand and Abdul Rashid JJ.

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 Nov. 12.

MANGAL SINGH (DECEASED) THROUGH HIS REPRESENTATIVE AND OTHERS (DEFENDANTS)
 Appellants

versus

MST. INDAR KAUR (DECEASED) THROUGH HER REPRESENTATIVES, AND OTHERS (PLAINTIFFS)
 Respondents.

Civil Appeal No. 381 of 1930.

Custom — Succession — Bajwa Jats — Sialkot District — Self-acquired property—daughter or near collaterals—Riwaj-i-am.

Held, that by custom among *Bajwa Jats* of the Sialkot District a daughter is entitled to succeed to the self-acquired property of her father in preference to his near collaterals.

Said v. Mst.Said Bibi (1), *Khuda Dad v. Mst.Rabia Bibi* (2), *Budha v. Fatima Bibi* (3), *Shahamad v. Mst. Muhammad Bibi* (4), *Fateh Din v. Mst.Muhammad Bibi* (5), and *Manzur Ali v. Amir Ali Khan* (6), relied upon.

Riwaj-i-am, discussed.

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- (1) (1929) I. L. R. 10 Lah. 489. (4) (1929) I. L. R. 10 Lah. 485.
 (2) 1930 A. I. R. (Lah.) 724. (5) (1930) I. L. R. 11 Lah. 415.
 (3) (1933) I. L. R. 4 Lah. 99. (6) (1930) 10 Lah. L. T. 3.