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circumstance was sufficient to justify his disposing of the *darkhást* in the manner he did; and it may be that the decree being one in a partition suit the defendant himself could have applied at any time to the Court, by showing sufficient cause to have the order cancelled and partition proceeded with, but the order not having been made owing to any default on the part of the respondent and being still in force when the present *darkhást* was presented, there is the same reason for treating it as being, to use Stuart, C. J.'s language in *Paras Rám* v. *Gardner*(1), "in legal continuance" of the *darkhást* of 1882, as was done in those cases which have been referred to by the respondent.

We think, therefore, that the lower Court of appeal was right in its view of the present *darkhást*, and that its order should be confirmed with costs.

Decree confirmed.

(1) I. L. R., 1 All., 355.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Birdwood.

SHAIK IDRUS, (ORIGINAL PLAINTIFF), APPELLANT, *v.* ABDUL RAHIMAN AND OTHERS, (ORIGINAL DEFENDANTS), RESPONDENTS.*

1891. *July* 20.

Mortgage—Construction—Intention of parties—Mortgagee to have possession for ten years and to receive profits in lieu of interest—Mortgagor to recover possession in the year he paid the money after the expiration of the period—Mortgagee's right of sale—Clause 3, *Section* 15 *of Regulation V of* 1827—*Mortgagee's personal remedy against the mortgagor—Limitation.*

Where a mortgage-bond contained a stipulation that the mortgagee should enter into possession of the mortgaged property and enjoy the rents and profits in lieu of interest for ten years, and that after the expiration of that period the mortgagor should enter into possession in the year in which he paid the debt,

Held that it was the intention of the parties that the mortgaged property should not be sold in satisfaction of the mortgage-debt, that the mortgagee was to remain in possession for ten years, and that under clause 3 of section 15 of Regulation V of 1827 he had no power of sale.

The mortgagee having brought his suit within three years from the expiration of the stipulated period of ten years,

Held, that the mortgagee's personal remedy against the mortgagor was not time-barred.

* Second Appeal, No. 447 of 1890.

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THIS was a second appeal from the decision of M. P. Khareghát, Assistant Judge of Thána.

Suit to recover amount due under a mortgage-bond.

The plaintiff sued to recover the sum of Rs. 598-13-0 due on a mortgage dated the 23rd June, 1876. He prayed for payment, and, in default, that the land should be sold, and for a decree against the first defendant personally for any balance that might remain unsatisfied.

By the mortgage-deed certain land was mortgaged to the defendants with possession for ten years, the rents and profits to be taken in lieu of interest. The following is the material part of the deed:—

"The land, as described above, we have given into your possession for profit or loss, under an agreement for ten years. Therefore, the profit or loss (in respect thereof) during the ten years is yours. We have nothing to do with the same. In the year in which we will pay your amount at the harvest time in the month of *Márgashirsh*, on the expiry of the ten years, we will take the land for the next succeeding crops. If we make default in causing the tenants to pass their *kabuláyats* (to you) in respect of the same, or in any manner whatever, we will calculate interest at one per cent. per month from the date of the bond and pay off your amount on personal security."

The Subordinate Judge passed a decree for the plaintiff. On appeal the Assistant Judge found that under the terms of the deed the plaintiff could not recover the money advanced by the sale of the mortgaged property, and that the claim against defendant No. 1 personally was time-barred.

The following is an extract from his judgement:—

"The deed is not an ordinary mortgage-deed. It provides that the plaintiff should take possession of the property and enjoy the fruits thereof for ten years, and all loss or profit accruing therefrom is to be his, the principal bearing no interest; that at the end of the ten years the principal would be paid back to him, and property recovered, and that he was to continue in possession after the ten years until such payment; and what is most important, it recites, that if default be made in giving possession, the plaintiff is to recover the money advanced with interest at 12 per cent. from the executants personally. Such personal recovery is the only remedy provided for the recovery of the debt if possession be not given; there is no condition at all as to the sale of the property or recovery from the property in any other way. * * It is pretty clear from the condition of possession, as well as from the condition in default of possession, that the intention of the parties must have been to avoid sale of the property under all circumstances; such a condition of sale, therefore, cannot be taken as impliedly incorporated in the deed."

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The plaintiff appealed to the High Court.

Ráo Sáheb *Vásudeo Jagannáth Kirtikar* for the appellant:—The lower Court has construed the mortgage-deed as if it created only a money obligation. It is a mortgage and under it we are entitled to all the remedies which a mortgagee ordinarily has. It is a usufructuary mortgage; we are entitled under it to remain in possession of the property for ten years and enjoy profits in lieu of interest during that time; and after the expiration of the stipulated period the executants were to pay us our money and we were to restore the property to them—*Venkatesh Shetti* v. *Náráyan Shetti*(1). Further, the document creates a charge on land—*Motiram* v. *Vithai*(2). Even if it does not, the lower Court was wrong in rejecting our claim on the ground of limitation. Under the terms of the document ten years is the period allowed for the payment of the mortgage-debt. That time expired in 1886 and our suit was filed in 1888, and is not barred.

Dáji Ábáji Khare for respondents Nos. 3—7:—No. issue was raised in the lower appellate Court as to the personal liability of the respondents. In his plaint the appellant does ask for a personal decree against us. The prayer is that the property be sold, and that for the balance, if any, a personal decree should be passed against respondent No. 1 only.

Clause 3, section 15, Regulation V of 1827, provides for the sale of the mortgaged property only when there is no other special agreement in the deed. This document is not merely silent as to the right of sale, but it contains a special agreement, *viz.*, that the mortgagee should remain in possession for ten years, and after the expiration of that period the mortgagor should pay the mortgage amount and take back the land. It is clear that the parties never intended that the property should be sold for the payment of the debt. It is also to be noted that though the deed states that the mortgage was with possession, still the appellant was never put in possession of the property. He admits in his plaint that he was not put in possession, and claims interest on the mortgage-debt from the date of the transaction, *viz.*, the 23rd June, 1876.

(1) I. L. R., 15 Bom., 183. (2) I. L. R., 13 Bom., 90.

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Ráo Sáheb *Vásudeo Jagannáth Kirtikar* in reply :—The document gives the land as security for money. Regulation V of 1827 makes no distinction between an ordinary and a usufructuary mortgage. All these distinctions are made by the Transfer of Property Act (IV of 1882), which is not applicable to the Presidency of Bombay. It is true that we were not put in possession, but want of possession cannot affect the nature of the security, the mortgage amount being all along secured on the land.

SARGENT, C. J. :—We agree with the lower appellate Court that it was the intention of the parties that the land mortgaged to the plaintiff should not be sold in satisfaction of the mortgage-debt. The plaintiff was to enter into possession of it and enjoy the rents and profits for ten years in lieu of interest. The land was, no doubt, pledged as security for the debt; but the mortgage-bond contains an express stipulation that, after the expiration of the ten years, the defendant was to enter into possession in the year in which he paid the debt. In other words, the plaintiff was to remain in possession till then, and the land was not to be sold. That being so, the plaintiff has no power of sale under clause 3 of section 15 of Regulation V of 1827.

We cannot, however, agree with the lower appellate Court that the plaintiff's personal remedy against the defendant No. 1 was barred by time, for the mortgage-debt was not payable till the expiry of the ten years referred to in the bond,—that is, not till 1886. The suit was brought in 1888 and was, therefore, in time.

We must, therefore, reverse so much of the decree of the lower appellate Court as rejects the claim against defendant No. 1 personally and direct that claim to be re-heard on appeal on the merits as against defendant No. 1. Costs as between plaintiff and defendant No. 1 to abide the result. Appellant to pay the costs of the other defendants throughout.