officers. They are not parties to this suit: and no order of the Collector has been shown us, nor any evidence from which we can infer that the payment to the village officers was made under compulsion used by the Collector.

For these reasons we reverse the decree of the District Court, and reject the plaintiff's claim with costs throughout.

Decree reversed.

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THE SECRETARY OF STATE FOR INDIA v. BALVANT RÁMCHANDRA NÁTU.

APPELLATE CIVIL.

Before Mr. Justice Bayley, Chief Justice (Acting), and Mr. Justice Candy.

MAHA'DA'JI, (ORIGINAL DEFENDANT), APPELLANT, *v.* JOTI (ORIGINAL PLAINTIFF), RESPONDENT.*

1892. *July* 25.

Mortgage—Simple mortgage usufructuary—Right to have the property sold—Distinct covenant to pay the principal—Possession in lieu of interest—Sale to recover principal only—Construction.

A merely usufructuary mortgage will confer no right to have the mortgaged property sold. But where there is a distinct covenant to pay the principal, and the land is security for the same, the intention of the parties is that the property should be sold. Such a transaction is a simple mortgage usufructuary, and carries with it the right to have the property sold in default of payment of the principal.

A mortgagee, who is entitled to possession in lieu of interest and who does not take possession, loses his right to interest, and cannot ask that the property be sold for default in payment of interest, the property being security for the principal only.

THIS was a second appeal from the decision of M. H. Scott, District Judge of Sátára.

The plaintiff sought to recover from the defendant personally, and on his default from the mortgaged property, Rs. 1,000, (Rs. 500 principal and Rs. 500 interest), due upon a mortgage-bond dated the 27th March, 1873, which ran as follows:—

Bond for debt, the 14th of *Falgun Vadya, Shak* 1794—the cyclical year, name thereof being *Angira*—corresponding with the English year 1873. On this day the bond is given in writing to the creditor named Rájáshri Joti bin Rája Pátil Yádav, by caste Marátha, occupation agriculture * * inhabitant of mauje Yeravle, táluka Karád, as follows:—I have received from you this day principal Rs. 500 (five hundred) of the *Gádi* Surat currency. As for the interest of the said amount, I have given (the produce of) my own land which is in my

* Second Appeal, No. 7 of 1891.

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MAHÁDÁJI v. JOTI.

own enjoyment situate at mauje Yeravle * * called Sarkari Dale Vihiriche, Survey No. 22, (measuring) acres 1-31 and assessed at Rs. 9. The four boundaries thereof are * * * . (The produce of) the land as comprised within the above four boundaries I have given in liquidation of the interest on the said amount. Therefore, you are to receive interest on the said amount from the produce of the said land. You are to do all, (that is) bestow labour on the said land and to receive all the produce. You are to pay the Government assessment on the said land and to receive the interest. The period (fixed) for the (payment of the) amount is five years from the date of the bond, within which time I will pay the principal amount of Rupees five hundred and redeem the land. There is a well in the said land. You are to take my share of water from the well and to raise garden crops in the said land. Should the amount remain unpaid after that date, I will continue the land with you until I pay the amount. I will not plead any objection, &c. You are to keep the embankments and boundary marks of the said land in repair according to law. Unless I pay the money I will not disturb (your) possession of the land. This bond I have duly given in writing. The date aforesaid. I, the debtor, have duly received the said amount of Rs. 500 (five hundred) of the Surat currency which you have this day paid to me, and have duly given this acknowledgment in writing. The date aforesaid. The handwriting of Antáji Bálkrishna Vategaṅkar, inhabitant of Yeravle, the 27th March, 1873. My own handwriting.

The defendant admitted the execution of the bond, but pleaded want of consideration and limitation.

The Subordinate Judge found that the payment of consideration was not proved, and rejected the claim.

On appeal the District Judge held that the consideration was paid; he, therefore, reversed the decree and allowed the plaintiff's claim.

The defendant preferred a second appeal.

Lang (Advocate General) with *Vishnu Krishna Bhatavdekar* for the appellant (defendant):—The mortgage-bond stipulates that the plaintiff should take and retain possession of the property for five years and appropriate the income in lieu of interest. But as he failed to take possession, the Judge has passed a personal decree against the defendant. The plaintiff's cause of action against the defendant personally is clearly time-barred, the suit not being brought until 1888. Further, the lower Court was wrong in allowing interest. Under the terms of the deed, the plaintiff was to take possession, and appropriate income in lieu of interest. If he failed to take possession, he must suffer for his own negligence. Lastly, the Judge was wrong in passing

a decree for the sale of the property. The transaction in dispute is a usufructuary mortgage, which does not carry with it the right of sale—*Shaik Idrus* v. *Abdul Rahiman*(1).

[CANDY, J.:—How do you reconcile the ruling of the Full Bench in *Motirám* v. *Vithái*(2) with the one quoted?]

The mortgage in that case was a simple mortgage usufructuary. The intention with respect to the sale of the property must be gathered from the instrument itself. If it contains no claim of sale, then there can be no sale. Section 67 of the Transfer of Property Act (IV of 1882) is to the same effect. The words in the bond sued upon are "unless I pay the money I will not disturb your possession." There is nothing in the bond to show that the right of sale was given to the mortgagee.

Phirozeshah M. Mehta (with *Ganesh Krishna Deshmukh*) for the respondent (plaintiff):—The instrument in dispute is an ordinary mortgage-bond. The interest was not secured upon the produce of the land. The produce was to be taken merely in liquidation of interest. The ruling in *Shaik Idrus* v. *Abdul Rahiman*(1) is not applicable to the present case, because in that case there was no stipulation that the mortgagor should pay the amount; the amount was to be recovered from the mortgaged property. The bond in the present case contains a covenant that the defendant would pay the money after the expiration of five years—*Ramayya* v. *Guruva*(3). There being an undertaking in the mortgage-bond to pay, that gives the mortgagee a right to sue for sale. When there is a covenant in the usufructuary mortgage to pay, as in the present case, it ceases to be a pure usufructuary mortgage, and carries with it the right of sale if the money be not paid within the stipulated time—Macpherson on Mortgage, page 11. Owing to the plaintiff's failure to take possession of the land, the defendant has not only appropriated the produce thereof, but has, in addition, enjoyed the benefit of the loan of Rs. 500. We are, therefore, entitled to recover interest.

(1) I. L. R., 16 Bom., 303. (2) I. L. R., 13 Bom., 90.
(3) I. L. R., 14 Mad., 232.

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CANDY, J.:—Admittedly the decree against the defendant personally was bad and must be reversed.

It is further contended that under the bond the mortgagee had no right to ask that in default the land should be sold. But this is not so. It was not merely a usufructuary mortgage, which would confer no right to have the property sold. There was a distinct covenant to pay the principal, and the land was security for the same; so we cannot infer that the intention of the parties was that the property should not be sold. It was a "simple mortgage usufructuary," carrying the right to have the property sold in default of payment of the principal sum of Rs. 500.

Plaintiff's pleader also asks that the property may be sold in default of payment of interest. That claim is bad. For the plaintiff was entitled to possession in lieu of interest, and, if he never took the trouble to obtain possession, he lost his right to interest. The land was security for the principal. The decree must be amended, and judgment passed for Rs. 500, to be paid within three months; in default the land to be sold. Costs in proportion throughout.

Decree amended.

APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Telang.

1892
August 1.

BHAGVA'N, (ORIGINAL PLAINTIFF), APPELLANT, *v.* KESUR KUVERJI, (ORIGINAL DEFENDANT), RESPONDENT.*

Civil Procedure Code (Act XIV of 1882), Sec. 574—Judgment of Appellate Court—Reasons for the decision to be stated.

Section 574 of the Code of Civil Procedure (Act XIV of 1882) is imperative and under it the Appellate Court is bound to state the reasons for its decision.

A Court of appeal framed certain issues under section 566 of the Code of Civil Procedure (Act XIV of 1882), and remanded them for findings by the original Court. On the return of those findings, as neither party filed any objections, the

* Second Appeal, No. 298 of 1891.