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We are unable to agree with that view. If notice had not been given it is difficult to suppose that the Agent or his officers or their legal advisers would not have made mention of the fact.

We do not think that it would be right at this stage of the case to send it back in order that evidence might be taken. We have no reason to suppose that the notice was not given. The object of the section apparently is to prevent stale claims, and this most certainly was not a stale claim, for the Company were sued within two months of the breach of the contract.

We therefore reverse the decisions of the lower Courts and award the amount of the claim with costs in all Courts.

Decree reversed.

APPELLATE CIVIL.

Before the Hon'ble Mr. E. T. Candy, C.S.I., Acting Chief Justice, and Mr. Justice Chandavarkar.

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AMARCHAND LAKHMAJI AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* KILA MORAR AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

Transfer of Property Act (IV of 1882), sections 58, clauses (b), (d), and 98—Usufructuary mortgage—Simple mortgage—Anomalous mortgage—Suit by mortgagees for recovery of debt and in default of payment by mortgagors for foreclosure and possession.

A mortgage-deed (1) put the mortgagees in possession of the mortgaged property and authorized them to retain possession until payment of the mortgage-money, the mortgagors being given credit for all profits recovered from the mortgaged property over and above the Government assessment. (2) It also contained a personal covenant by the mortgagors to pay the mortgage-money and an implied agreement that in the event of non-payment the property should be sold (the debt to be recovered from the mortgaged land and from the persons and from other property of the mortgagors).

Sometime after the date of the mortgage the mortgagees let out the mortgaged property to the mortgagors for a certain term, and before the expiration of the term, the mortgagees brought a suit for the recovery of the debt and in default of payment by the mortgagors for foreclosure and possession.

Held, that owing to the proviso (1), the mortgage was usufructuary within the meaning of clause (*d*) of section 58 of the Transfer of Property Act (IV of

*Second Appeal No. 711 of 1902.

1882) and owing to the proviso (2), it was a simple mortgage under clause (*b*) of the section. The transaction was therefore an anomalous mortgage provided for by section 98 of the Act, being a combination of a simple mortgage and usufructuary mortgage. In such a case the rights and liabilities of the parties must be determined by the contract as evidenced in the mortgage-deed, and, so far as such contract does not extend, by local usage.

Held, further, that though the plaintiffs were not entitled to regain possession, they having let out the property to the mortgagors for a term, still that circumstance did not affect the distinct and independent right of the plaintiffs to sue for the mortgage-money and to obtain a decree for sale of the mortgaged property.

SECOND appeal from the decision of H. L. Hervey, District Judge of Surat, confirming the decree of Mohanrai D., Subordinate Judge of Bulsár.

Suit for recovery of mortgage-debt and in default of payment for foreclosure and possession.

The property in suit was mortgaged with possession to the plaintiffs Amarchand Lakhmaji and Nanchand Lakhmaji by the defendants Kila Morar and Bai Ratan, widow of Dalu Morar, under a registered mortgage-deed, dated the 13th February, 1900. The mortgage-deed provided as follows :—

We have taken from you Rs. 499-4-0 for making payments to our money-lenders. The said rupees four hundred and ninety-nine and a quarter have duly become payable to you by us. Interest on those rupees accrues due at the rate of Rs. 1-4-0 per cent. per month. We are to make full payment to you of the said moneys together with compound interest on the balance which may be found due at the Divali at the expiry of one year from this day. We, as security for the said moneys, pass in writing to you the undermentioned land belonging to us by this deed-of-mortgage with possession and give the same into your possession on condition that we are to redeem the said land from your possession only when we pay in full your moneys together with interest; we are not to redeem the said land without paying off your moneys, nor can we pass the same in writing to any other person in any way..... We are to pay your moneys free of risk. If we fail to pay off your moneys in accordance with the abovementioned condition, you may take legal proceedings against us, and you are at liberty to recover as you like the said moneys together with c[illegible] the undermentioned mortgaged land or from the properties and [illegible] sorts belonging to us other than the said land, or from our person[illegible] heirs and others. You have henceforth the right to give under[illegible] in lease. So you may lease the said land to any one. And [illegible] recover any profits over and above the Government assessm[illegible] you are to give us credit for what may be recovered in t[illegible]

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On the 22nd March, 1900, the plaintiffs let out the mortgaged property to the defendants for a certain term, but the defendants having failed to pay rent, the plaintiffs on the 19th December, 1901 (that is, before the expiry of the defendants' lease), brought the present suit to recover possession of the property on foreclosing the defendants after the period of grace allowed by law.

The defendants admitted the mortgage and applied for the payment of the debt by instalments.

The Subordinate Judge dismissed the suit, holding that the mortgage was usufructuary which was not liable to be foreclosed.

On appeal by the plaintiffs, the Judge confirmed the decree on the following grounds:—

The mortgage of the plaint land is of the nature of usufructuary mortgage, although the deed contains a covenant to repay the amount advanced within one year. A suit for foreclosure is therefore undoubtedly not maintainable. Appellants' pleader does not seriously dispute this proposition, but urges that plaintiffs should nevertheless have been awarded possession of the mortgaged property as defendants have failed to pay the rent due under the rent-note under which they retained the land in their possession. In support of this argument Mr. Barjorji quotes cases in which the mortgagee obtained possession of the mortgaged property through the Court, when the mortgagor had failed to put him in possession, or, having done so, had wrongfully dispossessed him. Here such is not the case. The only way in which appellants can recover possession of the plaint property is by suing to eject defendants as defaulting tenants. The rent-note passed by the latter has not even been produced, and it is impossible for the Court to assume that its terms entitled plaintiffs to take possession of the land, when one year's rent remained unpaid. Then Mr. Barjorji contended that the lower Court should have passed a decree enabling plaintiffs to recover the debt by sale of the mortgaged property. No doubt a decree for sale could have been passed if it had been asked for in the plaint (*Hemraj* v. *Trimbak*, P. J. for 1897, p. 416; *Ramayya* v. *Guruva*, I. L. R. 14 Mad. 232), bu[illegible] whole nature of the suit would have been altered if such an amendment allowed. I do not think plaintiffs can rely on the fact that at the plaint they added a prayer for "any other relief that the Court This is a common form of words and does not entitle plaintiffs to ·ht the grant of a totally different relief to that which is speci- dditional Court-fee would have been required if a decree for moreover, the Court could not assume that plaintiff would a decree. A mortgagee, knowing that his debtor would

be unable to procure funds to redeem the mortgaged property, might sue for foreclosure and yet be quite unwilling to allow the property to be sold and pass out of his possession.

The plaintiffs preferred a second appeal.

Gokuldas K. Parekh appeared for the appellants (plaintiffs).

There was no appearance for the respondents (defendants).

PER CURIAM:—The mortgage-bond in this case puts the mortgagee in possession of the mortgaged property, and authorizes him to retain possession until payment of the mortgage-money, the mortgagors being given credit for all profits recovered from the land over and above the Government assessment; so far it is a *usufructuary mortgage* within the meaning of clause *(d)* of section 58, Transfer of Property Act.

The deed also contains a personal covenant by the mortgagor to pay the mortgage-money and an implied agreement that in the event of non-payment the property shall be sold (the debt is to be recovered from the mortgaged land and from the persons and other property of the mortgagors). So far it is a *simple mortgage* within the meaning of clause (*b*) of section 58, Transfer of Property Act.

The transaction then is an anomalous mortgage, provided for by section 98 of the Transfer of Property Act, being a combination of a *simple mortgage* and a *usufructuary mortgage*.

As such, the rights and liabilities of the parties should be determined, as laid down in that section, by the contract as evidenced in the mortgage-deed, and, so far as such contract d not extend, by local usage.

Here the plaintiff-mortgagee sued for recovery of the in default of payment by the mortgagors for fore possession. To that relief he is not entitled be possession by leasing the land to his mortgagors if he seeks to regain possession he must sue as determination of the tenancy. Though he which he is not entitled, that ought not to right to the relief which he can legally clai mortgagor went into possession as a ten distinct and independent right of the mortgage-money. An account must b

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the mortgage and the plaintiff given a decree for sale. There is obviously no bar of limitation or institution fee. The claim should be valued at the amount of the debt sought to be recovered: Transfer of Property Act, section 92, and *Hemraj* v. *Trimbak*.[1]

We reverse the decrees of the lower Courts and remand the case to be disposed of in accordance with the above remarks. Costs to abide the result.

Decree reversed. Case remanded.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Jacob.

1903. *July 4.*

MANEKSHAH SORABJI GANDHI (APPLICANT-DEFENDANT), APPELLANT, *v.* DADABHAI JAMSHETJI (OPPONENT-PLAINTIFF), RESPONDENT.*

Civil Procedure Code (Act XIV of 1882), sections 344, 345, 588 (17) and 589—Application to be declared an insolvent—Subject-matter of the suit over Rs. 5,000 in value—First Class Subordinate Judge—Rejection of the application—Appeal—District Court.

In a suit, the subject-matter of which was over Rs. 5,000 in value, the plaintiff applied for execution. The defendant applied to be declared an insolvent under sections 344 and 345 of the Civil Procedure Code (Act XIV of 1882). The First Class Subordinate Judge rejected the application. An appeal was preferred to the High Court.

Held, dismissing the appeal and returning the memo. of appeal for presentation proper Court, that the appeal lay to the District Court under sections se (17), and 589 of the Civil Procedure Code (Act XIV of 1882).

yer v. *Jamboo Ayyan* not followed.

rom the order passed by Bhaskar Shridhar Joshi, bordinate Judge of Surat, on the 7th October, 1901, s Application No. 37 of 1899.

adabhai Jamshetji obtained against the defend- orabji a decree in the Court of the First Class f Surat. The subject-matter of the decree was

Appeal No. 4 of 1902.

(2) (1892) 17 Mad. 377.