APPELLATE CIVIL.

Before Mr. Justice Candy and Mr. Justice Fulton.

BALSHET (ORIGINAL PLAINTIFF), APPELLANT, *v.* DHONDO RAMKRISHNA AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

1901. *July* 16.

Dekkhan Agriculturists' Relief Act (XVII of 1879), section 22—Mortgage—"Specifically mortgaged"—What amounts to a mortgage—Covenant to pay produce of land—Transfer of Property Act (IV of 1882), section 58.

Bhiku, an agriculturist (father of defendants 3 to 5), borrowed in 1866 a sum of money from the plaintiff's mother Yesubai under a bond, whereby he mortgaged his house as security and also covenanted to pay each year to Yesubai half the produce of certain land as interest and the other half in reduction of the principal, and in case of default she was to be at liberty to let the land to others and take the profits. Yesubai subsequently sued to recover the debt and obtained a decree directing the sale of the land. In execution of this decree the land was sold on the 5th June, 1896, and was bought by the plaintiff who now sued for possession. It was contended on behalf of the defendants that the covenant to pay the produce did not amount to a "specific mortgage" of the land, and that consequently the sale to the plaintiff was invalid under section 22 of the Dekkhan Agriculturists' Relief Act (XVII of 1879).

Held, that the land was specifically mortgaged for the repayment of the debt and that the sale was valid and the plaintiff entitled to recover possession.

SECOND appeal from the decision of R. Knight, Esquire, District Judge of Sátára, confirming the decree of Ráo Sáheb B. Y. Gupte, Subordinate Judge of Wái.

Suit for possession of certain land by a mortgagee who had purchased at a court-sale held in execution of a decree obtained upon his mortgage. Defendants 1 and 2 were the Inámdárs of the land. Defendants 3 to 5 were the sons of the original mortgagor and defendants 6 to 8 were tenants of the Inámdárs (defendants 1 and 2).

In 1866 one Bhiku, an agriculturist (father of defendants 3 to 5), borrowed money from Yesubai (mother of the plaintiff) and gave a bond, whereby he mortgaged his house as security and also covenanted as follows:

The lands of three Inámdárs are in my possession. I will give you half their produce as interest and the other half after payment of the assessment in

* Second Appeal No. 620 of 1900.

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reduction of the principal. If I fail to pay you, you may let the lands to others and take the profits, and I shall not be entitled to have it back until the money is paid.

He further covenanted that if the produce was not paid annually as above provided he would sell the house and pay the whole debt, remaining personally liable for any deficit.

In 1868 Yesubai, the creditor, took possession of the land, Bhiku having failed to pay the produce as provided in the deed.

In 1890 the heirs of the mortgagor, Bhiku (defendants 3 to 5), sued to redeem the mortgage, and under section 43 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) appeared before the Conciliator to settle the account. Before him the parties came to an agreement in writing that the mortgagor's heirs (defendants 3 to 5) should be restored to possession of the land, and that they should pay off the debt due on the mortgage by instalments. In default the land and house were to be sold, and the mortgagor was thus to recover his whole debt. This agreement was duly filed under section 44.

Under this agreement defendants 3 to 5 were put back into possession of the property. They failed, however, to pay the assessment due to the Inámdárs (defendants 1 and 2) in respect of the said land, and on application by the Inámdárs to the Revenue authorities (the Collector) they declared the possession of defendants 3 to 5 to be forfeited, and they gave possession of the land to the Inámdárs. This decision was reversed on appeal to the Commissioner, who held there was no forfeiture.

The Inámdárs, however, remained in possession as the Revenue authorities were of opinion that they had no power under the Land Revenue Code to give back possession to defendants 3 to 5.

Under these circumstances the defendants 3 to 5 failed to pay to the mortgagee the instalments due under the agreement made before the Conciliator, and the mortgagee sued to recover her debt by sale of the property. She obtained a decree directing a sale. In execution the property was sold on the 5th June, 1896, and the plaintiff (son of Yesubai, the mortgagee) having obtained permission to bid, bought it.

On his attempting to obtain possession, he was obstructed by the Inámdárs (defendants 1 and 2). They claimed to hold both

inám and miras rights in the land, and contended that the plaintiff had got nothing by his purchase at the execution sale.

The plaintiff thereupon filed this suit for possession.

Defendants 1 and 2 (the Inámdárs) pleaded that, as to the eastern moiety of the land, the suit was barred by limitation, inasmuch as neither the mortgagor (Bhiku) nor the mortgagee (Yesubai) nor their heirs had had possession for many years. As to the rest of the land they contended that the sale was invalid, as the bond of 1866 did not warrant a sale and section 22 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) forbidding a sale of immovable property in execution unless it has been specifically mortgaged.

The Subordinate Judge dismissed the suit. He held that defendants 3 to 5 owned miras rights over the western moiety of the lands, but they had not held the eastern moiety within twelve years before the date of the suit; that as regards the eastern moiety the plaintiff's claim was time-barred; that defendants 1 and 2 were entitled to question the validity of the auction-sale of 1896; that the auction-sale was illegal and invalid; and that therefore the plaintiff was not entitled to any relief.

On appeal the District Judge confirmed the decree of the Subordinate Judge. His reasons were:

There is nothing in the bond of 1866 which makes the land itself liable for the debt. Its profits were to be devoted to the payment of principal and interest, but there is no provision in the bond giving the mortgagee a remedy against the land. A decree, therefore, which directs the sale of the land in order to defray the debt is *primâ facie* in contravention of the provisions of section 22 of the Dekkhan Agriculturists' Relief Act; and it is *ipso facto* invalid.

The plaintiff preferred a second appeal.

M. B. Chaubal for appellant (plaintiff):—The lower Courts erred in holding that there was no specific mortgage of the land by the terms of the bond. "Mortgage" is defined by section 58 of the Transfer of Property Act IV of 1882, and it is enough to make a transaction a mortgage if there is a transfer of an interest in specific immovable property for the purpose of securing the repayment of money. The covenant to give the annual profits of this property to the mortgagee was such a transfer, and the

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absence of the power of sale as regards the land, though such power was expressly given as regards the other property (the house), did not the less make the transaction a mortgage and transfer. There is nothing in section 22 of the Dekkhan Agriculturists' Relief Act as to a mortgagee having the power of sale.

Secondly, under the terms of the bond the mortgagee was in possession from 1868 to 1890, and even if the sale was invalid he was clearly entitled to recover the possession from trespassers like defendants 1 and 2. If the sale was invalid, he could certainly fall back upon the bond under the terms of which he was in possession for over twenty-two years.

The respondents did not appear.

CANDY, J.:—In 1866 Bhiku Mahar borrowed Rs. 150 from the plaintiff's mother, and passed to her a bond (Exhibit 82), by which he covenanted to pay to the creditor half the produce of certain land in lieu of interest of the principal sum, and for the principal the remaining moiety of the produce at the market rate was to be paid, the creditor from this half defraying the assessment and taking the balance against the principal; in default the creditor was to be at liberty to let the land to any other person and take the profits. Further as security (*gahan*) the debtor mortgaged his private house, and covenanted that if annually the creditor did not receive the produce as above stated, then he (the debtor) would pay off the whole amount by selling the house, being personally liable for any deficit. In 1868 the creditor took possession of the land.

In 1890 the mortgagor sued to redeem the mortgage; and in accordance with section 43 of the Dekkhan Agriculturists' Relief Act the parties before the Conciliator came to an agreement which was reduced to writing (Exhibit 59), the purport of which was that the mortgagor was to go back into possession of the land and pay off the debt by certain instalments, and in default the mortgagee was to recover the whole debt by sale of the land and house. This agreement was forwarded to the Subordinate Judge, who under section 44 ordered it to be filed. (This was before the amending Act VI of 1895.)

The mortgagor was accordingly put back into possession of the

land. But there being default in the payment of the assessment due to the Inámdár, application was made for assistance to the Revenue authorities, who declared the occupancy of the Mahar to be forfeited, and gave possession of the land to the Inámdár. This action of the Collector was on appeal reversed by the Commissioner, who held that there should be no forfeiture. But the Inámdár remained in possession, the Revenue authorities being of opinion that there was nothing in the Land Revenue Code which enabled them to restore possession to the Mahar.

In the meanwhile, there having been default in payment of the instalments due according to the abovementioned agreement, the mortgagee sued to recover the debt by sale of the land, and a decree was obtained directing a sale as prayed for. In execution of that decree the land was sold through the Collector on 5th June, 1896, and bought by the mortgagee's son, the plaintiff, who had obtained permission to bid.

In attempting to obtain possession, plaintiff was obstructed by the Inámdárs (present defendants 1 and 2, son and father), who claimed to hold both the miras and inám rights in the land, and also pleaded that plaintiff had purchased nothing at the court-sale on 5th June, 1896. Hence this suit by plaintiff to establish the right which he claimed to the present possession of the land.

Defendants 3 to 5 are the sons of Bhiku Mahar, the original mortgagor. They did not appear to defend.

Defendants 6 to 8 are tenants under the Inámdárs.

The Subordinate Judge, who in the Court of first instance decided the suit, rejected the plaintiff's claim on the ground that the auction-sale at which he purchased was a nullity under section 22 of the Dekkhan Agriculturists' Relief Act, because the land was not specifically mortgaged by the bond of 1866. The Subordinate Judge further held that the Inámdárs (defendants 1 and 2) did not own the miras rights: also that Bhiku Mahar's rights were confined to the western moiety of the land, and that the plaintiff's claim to the eastern moiety would in any case be barred. There is no appeal on these points, so the issue relates solely to the western moiety of which Bhiku was the Mirasdár, the right of the Inámdárs (defendants 1 and 2) to possession on forfeiture having been negatived by the Commissioner.

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Plaintiff's claim to possession having been rejected by the Subordinate Judge, he appealed to the District Court. The District Judge, Mr. Knight, held that defendants 3 to 5 are the Mirásdárs of the land, but that as the Inámdárs (defendants 1, 2) were in possession, the mirási interests at present were vested in them *de facto*, if not *de jure;* and being in possession they represent the Mirásdárs, and so may resist a claim brought in derogation of those rights in all methods open to the true Mirásdárs. Mr. Knight further held that the sale to plaintiff of 5th June, 1896, was invalid, because though the loan of 1866 was to some extent secured on the property and the profits of the land were hypothecated to the mortgagee in payment of both principal and interest, still the profits were treated as nothing but a means of repayment, and that as security for the debt the house was expressly mortgaged: there was no provision in the bond giving the mortgagee a remedy against the land. A decree, therefore, which directed the sale of land in order to defray the debt was *primâ facie* in contravention of the provisions of section 22 of the Dekkhan Agriculturists' Relief Act, and was *ipso facto* invalid.

This is the main question which has been argued before us in second appeal brought by the plaintiff, the respondents not having appeared.

It is unnecessary for us to decide whether, as held by Mr. Knight, an agreement creating a charge upon property which must have been in 1890 forthwith reduced to writing before the Conciliator under section 43 of the Dekkhan Agriculturists' Relief Act, and then forwarded by the Conciliator under section 44 to the Subordinate Judge, and then ordered to be filed, taking effect from that day as a decree of the Court, would be invalid because it was unstamped, and because it had not been written by, or under the superintendence of, the Village Registrar under section 56 of the Dekkhan Agriculturists' Relief Act. As a fact, stamp duties on such documents were remitted by the Government of India in 1880. And there is no question here of admitting in evidence or acting upon such document. All that we are concerned with is the decretal order directing the sale of the land.

Now section 22 of the Dekkhan Agriculturists' Relief Act

provides that immovable property belonging to an agriculturist shall not be sold in execution of any decree or order, unless it has been specifically mortgaged for the repayment of the debt to which such decree or order relates, and the security still subsists. It may possibly have been the intention of the Legislature that there should be no sale, unless the specific mortgage by the terms of the contract or by operation of law give the mortgagee the power to sell. But this is not the language of the section. We have simply to inquire—Was the land specifically mortgaged for the repayment of the debt? Does the decree or order relate to that debt? Does the security still subsist? We think that these questions must be answered in the affirmative.

Though the Transfer of Property Act does not apply to this case, we may have resort to its provisions as embodying what has always been the law. A 'mortgage' is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced, &c. 'Transfer of property' means an act by which a living person conveys property in present or in future &c. Here the mortgagor covenanted that he would give the mortgagee the produce of certain lands in payment of the debt and interest. The interest in the immovable property was intended as security for repayment of the debt. The word 'specifically' in section 22 of the Dekkhan Agriculturists' Relief Act has no greater force than the word 'specific' in section 58 of the Transfer of Property Act. Though by the agreement of 1890, which has the force of a decree, provision may have been made for the payment of instalments, and for the sale of the land in default, the original debt and security were still subsisting. The superaddition of payment by instalments and power of sale would not destroy the original debt or security.

For these reasons, therefore, we think that the sale of 5th June, 1896, was not a nullity, and that thus the plaintiff can recover possession of the western moiety of the land in suit. Decree amended accordingly, plaintiff obtaining his costs proportionately throughout from defendants 1 and 2.

Decree amended.