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We think that the question of domicile is wholly irrelevant to the question of jurisdiction in such a case as the present. The words of the Act alone have to be construed, and the words of the Act are "that an application must be made to the District Court having jurisdiction in the place where the minor ordinarily resides".

The minor is living in Baroda and he has no other place of residence, and he has, with the exception of twenty-eight days, lived in Baroda for nearly three years. We, therefore, think that Baroda is the place where the minor ordinarily resides within the meaning of section 9.

It is argued on behalf of the respondent (with what correctness we do not know) that the Mission House in Baroda where the minor is living is in British Cantonments and is within the jurisdiction of the Judicial District of Broach. It may be so, but even if it is so, that does not give jurisdiction to the District Judge of Ahmedabad.

We set aside the order of the District Judge and allow this appeal with costs.

Order reversed.

G. B. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

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PARASHARAM VISHNU DABKE AND OTHERS (ORIGINAL PLAINTIFF AND DEFENDANTS 1—5), APPELLANTS, *v.* PUTLAJIRAO KALBARAO AND OTHERS (ORIGINAL DEFENDANTS 6—18).*

Bombay Regulation V of 1827, section XV, clause 3—Usufructuary mortgage of 1869—Agreement to pay the debt after fixed period—Suit by mortgagee after the expiration of the period for the recovery of the debt by sale of mortgaged property.

A usufructuary mortgage executed in the year 1869 contained the following agreement:—

"The amount of Rs. 1,750 is borrowed on the said premises. We three of us shall, after paying off the said amount of debt after fifteen years from this day,

* Second Appeal No. 997 of 1908.

redeem our premises. Perhaps any one of us three might within the period pay off at one time the amount of rupees according to his share, you should allow redemption of the premises proportionately after receiving the amount and you should pass a receipt for the monies received."

In the year 1903 the mortgagee having brought a suit for the recovery of the mortgage debt by sale of mortgaged property, the first Court allowed the claim, but the appellate Court reversed the decree and dismissed the suit on the ground that where in the case of a usufructuary mortgage the mortgagor agrees to redeem by payment of the principal after a stated period, the mortgagee has no higher or better right than he has under a simple usufructuary mortgage.

Held, on second appeal by the plaintiffs, that the mortgage in suit was governed by clause 3, section XV of Regulation V of 1827, and there being nothing in the terms of the agreement between the parties which either expressly or by implication indicated that the property should not by means of a suit be applied in liquidation of the debt, the suit would lie.

The decree of the appellate Court reversed and that of the first Court restored.

Mahadaji v. *Joti*(1) and *Ramchandra* v. *Tripurabai*(2), followed.

Shaik Idrus v. *Abdul Rahiman*(3), *Sadashiv* v. *Vyankatrao*(4) and *Krishna* v. *Hari*(5), explained.

SECOND appeal from the decision of J. D. Dikshit, Assistant Judge of Ratnagiri, reversing the decree passed by Sheshgiri, R. K., Subordinate Judge of Dapoli.

The property in suit originally belonged to three brothers, Kalbarao (father of defendants 6—8), Abajirao and Bajirao. They mortgaged it on the 9th April 1869 to Vishnu Raghunath Dabke, an ancestor of the plaintiffs and defendants 1—5, for Rs. 1,750. The mortgage was usufructuary. The material portion of the deed was as follows :—

Accordingly as aforesaid we all three of us have this day delivered over into your possession for the enjoyment as mortgagee the 33 *thikans* in all of our share consisting of the rice fields and *varkas* lands. You may yourself make the *vahivat* thereof or may give to others on rent and *ghumav*; and whatever rents and profits you will get is to be applied by you towards the satisfaction of interest (*i.e.*, in lieu of interest) and you should pay the Government assessment in the *khata* of Kalbarao, our eldest brother, in whose

(1) (1892) 17 Bom. 425.
(2) (1898) P. J., p. 43.
(3) (1891) 16 Bom. 303.
(4) (1895) 20 Bom. 296.
(5) (1908) 10 Bom. L. R. 615.

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name the *khata* stands in the Government records. The amount of Rs. 1,750 is borrowed on the said premises We three of us shall after paying off the said amount of debt after fifteen years from this day redeem our premises. Perhaps any one out of us three might within the period pay off at one time the amount of rupees according to his share you should allow redemption of the premises proportionately after receiving the amount and you should pass a receipt for the rupees received.

In 1880 Vamnaji Vishnu Dabke, a deceased son of the mortgagee, obtained a money decree against Kalbarao. In execution of that decree the mortgaged property was sold and was purchased by Ganesh Vasudev Joshi on the 14th October 1884. On the 5th April 1889 Ganesh Vasudev Joshi sold his title to plaintiff 1.

On the 18th January 1906 the plaintiffs brought the present suit alleging that they were in possession of the mortgaged property by themselves or through tenants till the year 1899 when defendants 6—8 denied the plaintiffs' title and asserted their own and that Rs. 1,975 were due to them under the mortgage. The plaintiffs, therefore, prayed for possession of the property as owners under the purchase from Ganesh Vasudev Joshi or as mortgagees or in the alternative to recover the sum due to them under the mortgage by sale of the mortgaged property.

Defendants 1—5, who were brothers of plaintiffs 1—5 and cousins of plaintiff 6, admitted the plaintiffs' claim. They were joined as defendants because they were unwilling to be joined as co-plaintiffs.

Defendants 6–8 answered *inter alia* that the property in suit was their ancestral estate and the plaintiffs had no interest therein, that the auction sale against their father Kalbarao did not pass more than his individual interest, that the delivery of possession at the auction sale was only nominal and the plaintiffs never got actual possession, that they were all along in possession and the claim was time-barred, and that they did not admit the mortgage transaction and nothing was due under it.

The Subordinate Judge found that the plaintiffs' title as owners was not proved, that they were not in possession within twelve years before the suit, that they were not entitled to

possession as purchasers or mortgagees, that the mortgage relied on by the plaintiffs was valid and proved and that the plaintiffs were entitled to recover Rs. 1,975 under the mortgage. He therefore passed a decree directing the defendants to pay to the plaintiffs and defendants 1—5 Rs. 1,975 with plaintiffs' costs within six months from the date of the decree and in default the amount to be recovered by sale of the mortgaged property or a sufficient portion thereof. The following are some of the observations of the Subordinate Judge in his judgment :—

This is the case of a mortgagee in possession obtaining a money decree and subsequently selling the equity of redemption through a transferee and ultimately buying it himself from the auction-purchaser. If section 99 of the Transfer of Property Act applied such a sale, held otherwise than by instituting a suit, would be void (I. L. R. 12 Mad. 325 ; I. L. R. 14 Mad. 74 ; Bombay Law Reporter VII, page 1). The only question is whether the principle of the section would be applicable to the present mortgage, which is of 1869, having regard to clause (c) of section 2 of the Act, which excludes from the operation of the Act, any right or liability arising out of a legal relation constituted before the Act came into force. The case reported at page 129 of I. L. R. 10 Madras is an instance of the section being applied to a mortgage passed before the Act came into force. See also I. L. R. 12 Cal. 583. Besides I. L. R. 1 Cal. 337 was decided before the Act and laid down that a mortgagee is not entitled by means of a money decree obtained on a collateral security to obtain sale of the equity of redemption separately. This case was followed by our own High Court in I. L. R. 4 Bom. 57 and I. L. R. 5 Bom. 5. These authorities lead me to hold that even apart from the Act, the sale held otherwise than by a suit upon a decree obtained by the mortgagee was invalid, and that plaintiffs did not acquire a valid title by their ultimate purchase from the auction-purchaser. It is true the mortgagee transferred his decree before execution, but the transfer was subject to the equities which the mortgagor might have enforced under section 233, Civil Procedure Code, against him (I. L. R. 22 Cal. 813).

On appeal by defendants 6—8 the Assistant Judge found that the mortgage sued on was not subsisting, that the plaintiffs were not entitled to recover anything under it, and that the claim was barred by the defendants' adverse possession. He, therefore, reversed the decree and dismissed the suit. In the course of his judgment the Assistant Judge made the following remarks :—

The ruling in *Krishna* v. *Hari*, 10 Bom. L. R. 615, dispels all the delusion on the question of law involved in a case like the present. Exception was taken at the bar to the correctness of the decision on the ground that it is

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inconsistent with a previous decision of a division bench of our High Court reported at p. 425 of I. L. R. 17 Bom. (*Mahadaji* v. *Joti*). It was further argued that the last quoted decision was not brought to their Lordships' notice when *Krishna* v. *Hari* was decided and it was consequently not referred to and considered. I cannot accept this argument as sound. The main test is, whether the property is hypothecated or whether it was the intention of the parties to make the property liable to be brought to sale in case the promised payment was not made. Their Lordships had before them this sound test and they have observed: "We do not find that this document contains anything more than a personal and conditional promise to pay. We do not see any indication that the property was hypothecated or that it was ever the intention of the parties that it should be liable to be brought to sale in case the promised payment was not made." It was therefore absolutely necessary to refer to the ruling in *Mahadaji* v. *Joti*, 17 Bom. 425, for in that case Candy, J., has distinctly observed "there was a distinct covenant to pay the principal and the land was security for the same," (*p.* 428). The principle enunciated in the latest ruling cited above has been long ago recognized by our High Court (*Shaik Idrus* v. *Abdul*, 16 Bom. 303). The reasons given in the full Bench Madras decision (*Kangaya* v. *Kalimuthu*, 27 Mad. 526) can be very easily refuted. But as there is an express ruling of our High Court it is not necessary to do so.

Even if the mortgage as regards lands were a combination of a simple and usufructuary mortgage the suit having been instituted more than 12 years after the due date has been barred (*Vasudeva* v. *Shrinivasa*, 9 Bom. L. R. 1104).

Plaintiffs and defendants 1—5 preferred a second appeal.

K. N. Koyaji for the appellants (plaintiffs and defendants 1—5):—The Assistant Judge erred in reversing the decree of the first Court for sale. The present case is governed by Regulation V of 1827, section XV, clause 3. It is a settled law in this Presidency that in cases governed by the Regulation, the mortgaged property is liable to sale where there is promise to pay: *Mahadaji* v. *Joti* [1], *Yashvant* v. *Vithal* [2], *Hemraj* v. *Trimbak* [3], *Ramchandra* v. *Tripurabai* [4]. In *Shaik Idrus* v. *Abdul Rahiman* [5] and *Sadashiv* v. *Vyankatrao* [6] there was no promise to pay, so those cases are inapplicable. The ruling in *Krishna* v. *Hari* [7] is distinguishable. The judgment in that case proceeded on the basis that there was a conditional promise to pay.

(1) (1892) 17 Bom. 425.
(2) (1896) 21 Bom. 267.
(3) (1897) P. J., p. 416.
(4) (1898) P. J., p. 43.
(5) (1891) 16 Bom. 303.
(6) (1895) 20 Bom. 296.
(7) (1908) 10 Bom. L. R. 615.

N. V. Mandlik for the respondents (defendants 6—8) :—The appellants cannot claim the right of sale, the bond being, as found by the lower Court, a purely usufructuary one. The case is governed by the Transfer of Property Act which provides, section 67, that a usufructuary mortgagee is not entitled to get the property sold. Even if the case be governed by Regulation V of 1827, still there is no personal covenant in the deed sued on. The mortgagee is to hold possession of the property only. He has no right of sale: *Sadashiv* v. *Vyankatrao* [1], *Shaik Idrus* v. *Abdul Rahiman* [2], *Krishnaji* v. *Wasudeo* [3], *Jafar Husen* v. *Ranjit Singh* [4]. Even admitting that there is a personal covenant, still that is not sufficient. There must be in addition to that a right of sale specifically given: *Krishna* v. *Hari* [5], *Kashi Ram* v. *Sardar Singh* [6], *Shaik Idrus* v. *Abdul Rahiman* [2], *Krishnaji* v. *Wasudeo* [3].

As to hypothecation, the definition of mortgage requires the creation of security or hypothecation; see section 58 of the Transfer of Property Act. A mere hypothecation clause by itself in a usufructuary mortgage does not give the mortgagee a right to sell which, as usufructuary mortgagee, he does not possess. The rulings in *Ramchandra* v. *Tripurabai* [7], *Yashvant* v. *Vitthal* [8] and *Mahadaji* v. *Joti* [9] are inapplicable. In those cases there was a personal covenant and a right of sale was contemplated, while the mortgage in the present case is a simple usufructuary mortgage. The Assistant Judge in appeal was conversant with the language in which the bond is written.

Section 99 of the Transfer of Property Act is applicable, and if it cannot directly apply, it embodies the law as it was administered before its enactment and is not a departure from that law: *Sathuvayyan* v. *Muthusami* [10], *Durgayya* v. *Ananthu* [11], *Bhuggobutty Dossee* v. *Shamachurn Bose* [12], *Martand* v. *Dhondo* [13]

(1) (1895) 20 Bom. 236.
(2) (1891) 16 Bom. 303.
(3) (1901) 3 Bom. L. R. 156.
(4) (1895) 21 All. 4.
(5) (1908) 10 Bom. L. R. 615.
(6) (1905) 28 All. 157.
(7) (1898) P. J., p. 43.
(8) (1895) 21 Bom. 267.
(9) (1892) 17 Bom. 425.
(10) (1888) 12 Mad. 325.
(11) (1890) 14 Mad. 74.
(12) (1876) 1 Cal. 337.
(13) (1897) 22 Bom. 624.

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and *Chundra Nath Dey* v. *Burrodx Shoondury Ghose*[1]. In *Husein* v. *Shankargiri* [2] the facts were altogether different.

SCOTT, C. J. :—The lower appellate Court has reversed a decree for sale obtained by the plaintiffs as mortgagees. The ground assigned for this decision is that where in the case of a usufructuary mortgage the mortgagor agrees to redeem by payment of the principal after a stated period the mortgagee has no higher or better rights than he has under a simple usufructuary mortgage.

The mortgage in question was effected in the year 1869. At that date the right of sale by mortgagees in the mofussil was governed by Regulation V of 1827, section XV, clause 3, which provides that in the absence of any special agreement or recognized law or usage to the contrary either party may at any time by the institution of a civil suit cause the property to be applied to the liquidation of the debt ; the surplus, if any, being restored to the owner.

In the case of mortgages prior in date to the time when the Transfer of Property Act was extended to this Presidency, the then existing rights of the parties remain unaffected : section 2 of Act IV of 1882. We are, therefore, in this case only concerned with the law enacted by the Regulation and with the terms of the agreement between the parties.

The instrument of mortgage after providing that the mortgagee in possession should manage the property, taking the profits in lieu of interest, proceeds :

"The amount of Rs. 1,750 is borrowed on the said premises. We three of us shall after paying off the said amount of debt after 15 years from this day redeem our premises. Perhaps any one of us three might within the period pay off at one time the amount of rupees according to his share, you should allow redemption of the premises proportionately after receiving the amount and you should pass a receipt for the monies received."

The period of 15 years has long since expired and the question we have to determine is whether there is contained in the words above quoted expressly or by implication any agreement that

(1) (1895) 22 Cal. 813. (2) (1898) 23 Bom. 119.

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the property shall not by means of a suit be applied in liquidation of the debt. We think there is not.

The case is very similar to those of *Mahadaji* v. *Joti* (1) and *Ramchandra* v. *Tripurabai* (2). There is a distinct covenant to pay after fifteen years, with an option to pay within that period, the money borrowed on the premises.

It is an agreement of a different class from those which were under consideration in *Shaik Idrus* v. *Abdul Rahiman* (3) and *Sadashiv* v. *Vyankatrao*(4). In these cases there was no promise by the mortgagor to pay, but it was provided that he should be free to take possession whenever he chose to pay after the fixed period agreed upon for the mortgagee's enjoyment. In the case of *Krishna* v. *Hari*,(5) relied upon by the learned Judge in the Court below the agreement was of the same kind as that in *Shaik Idrus* case(3).

We reverse the decree of the lower appellate Court and restore that of the first Court with costs throughout other than the costs of cross-objections.

Decree reversed.

G. B. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

GANESH NARAYAN SATHE (ORIGINAL OPPONENT), APPLICANT, *v.* PURUSHOTTAM GANGADHAR KARVE (ORIGINAL APPLICANT), OPPONENT.*

1909. *September* 23.

Civil Procedure Code (Act V of 1908), section 151—Decree of Small Cause Court—Money lying in deposit in the Court of the First Class Subordinate Judge—Attachment and recovery of money in execution of the Small Cause Court decree—Suit in the Court of the First Class Subordinate Judge for a

* Application No. 120 of 1909 under extraordinary jurisdiction.

(1) (1892) 17 Bom. 425.
(2) (1898) P. J., p. 43.
(3) (1891) 16 Bom. 303.
(4) (1895) 20 Bom. 296.
(5) (1908) 10 Bom. L. R. 615.