

against his landlord as such, but against a person who may happen to be his landlord, and who is being sued as purchaser of the occupancy right and in consequence of that purchase.

These are all the matters necessary for our consideration in this case.

The result is, that we must vary the decree of the lower Court by disallowing to Sobha Mahton the share which he claims. So far as he is concerned, therefore, the suit must be dismissed. Subject to this modification the decree will be affirmed.

The appellants must pay to the respondents the costs of this appeal.

s. c. c.

Appeal allowed in part. Decree varied.

Before Mr. Justice Trevelyan and Mr. Justice Beverley.

LUCHMESHAR SINGH (PLAINTIFF) v. DOOKH MOCHAN JHA
AND ANOTHER (DEFENDANTS).^o

1897
March 2.

Mortgage—Usufructuary mortgage—Sudbharna bond—Covenant to repay—Construction of mortgage bond—Suit for money and for sale—Transfer of Property Act (IV of 1882), section 67.

In a *sudbharna* mortgage bond it was stipulated, "having paid the principal money in the month of Chait 1297 we shall take back the document and the land. In case we fail to repay the principal money at due date the *sudbharna* bond shall remain in force."

Held, that there was in this contract no agreement to repay the principal money, and no such agreement was implied by the provisions as to taking back the document and the land, and therefore there was no right to a money decree.

Held, that under section 67 of the Transfer of Property Act (IV of 1882) an usufructuary mortgagee cannot as such (*i.e.*, unless there is any thing in the contract which would imply the right) sue either for foreclosure or for sale.

Umda v. Umrao Begam (1); *Chathu v. Kunjan* (2); and *Ramayya v. Guruva* (3) referred to. *Venkatasami v. Subramanya* (4) not followed.

^o Appeals from Appellate Decrees Nos. 531 and 738 of 1895, against the decree of Babu Jagaddurlabh Mozumdar, Subordinate Judge of Tirhoot, dated the 3rd of January 1895, reversing the decree of Babu Gyanendra Chandra Banerjee, Munsif of Modhubani, dated the 14th of June 1894.

(1) I. L. R., 11 All., 367.

(2) I. L. R., 12 Mad., 109.

(3) I. L. R., 14 Mad., 232.

(4) I. L. R., 11 Mad., 88.

1897
 LUCHMESHAR
 SINGH
 v.
 DOOKH
 MOCHAN JHA.

THESE were suits for recovery of money due upon *sudbharna* bonds, whereby the *bharnadar* or mortgagee retained possession of the mortgaged property in lieu of interest. In appeal No. 531, the suit was also for "making the mortgaged property liable for the debt" as well as the person and the other properties of the defendant, mortgagor. The bond in case No. 531, after stating that the consideration money had been received, proceeded:—

"We therefore declare and give out in writing that in lieu of interest we give in *bharna* 6 bighas 4 cottahs of *kanshareh* (low rate) *basht* land as per boundaries for a term of three years from 1294 to 1296 F. S. situate in *mouza*. * * * That the said *bharnadar* should hold possession over the *bharna* property and appropriate the proceeds thereof till the term of the bond. We shall pay the rent payable by us year after year in the *zemindari culchari*, and the *mahajan* shall have no concern with it; and having paid the principal money in the month of Chait 1297 we shall take back the document and the land. If the principal sum be not paid at the time fixed, then all the terms of this *sudbharna* will remain in force till the repayment of the sum.

The facts are sufficiently stated in the judgment of the High Court.

The plaintiff appealed to the High Court.

Babu *Ram Charan Mitra* for the appellant argued that a liberal construction should be put upon the document, and it should be held that there was an agreement to repay the money. The law (Transfer of Property Act, section 67) did not take away the right to a decree for sale of the mortgaged property in this case. He cited Dr. Rash Behary Ghose on Mortgage, 2nd edition, page 373, and the case of *Venkatasami v. Subramnya* (1).

Moulvie *Mahomed Mustafa Khan* for the respondent contended that there was no covenant to pay, and a decree for money or for sale could not be passed in these cases. He cited sections 58, 67, 68 and 62 (b) of the Transfer of Property Act and the following cases: *Umda v. Umrao Begam* (2); *Chathu v. Kunjan* (3); *Ramayya v. Gurusva* (4) *Gopaldasami v. Arunachella* (5).

(1) I. L. R., 11 Mad., 88.

(2) I. L. R., 11 All., 367.

(3) I. L. R., 12 Mad., 109.

(4) I. L. R., 14 Mad., 232.

(5) I. L. R., 15 Mad., 304.

Babu Ram Charan Mitra in reply.

1897

The judgment of the High Court (TREVELYAN and BEVERLEY, LUGHMESHAR SINGH JJ.) was as follows :—

Although these two cases were tried together in the lower Appellate Court and before us, they are not in every respect similar. v. DOOKH MOCHAN JHA.

They are both suits brought to recover money alleged to be due upon usufructuary mortgages, and in both cases the mortgagee alleged that he had given up possession of the property mortgaged. In No. 531 the plaintiff asked for and obtained from the first Court a decree for sale. In No. 738, he only asked for a money decree, which was given to him in the first instance. The lower Appellate Court has set aside both decrees and dismissed the suits on the ground that the contract does not give a right to sue for the money. We have heard the appeals argued at some length, and are of opinion that they must be dismissed.

The question depends partly upon the construction which is to be placed upon the particular contract, and partly upon the construction which is to be placed upon certain sections of the Transfer of Property Act.

To take first the contract in appeal No. 531, after a recital of the necessity for a loan of Rs. 124 the bond declares that in lieu of interest the executants give in *bharna* certain land for a term of three years from 1294 to 1296 F. S. "That the said *bharnadar* should hold possession over the *bharna* property and appropriate the proceeds thereof till the term of the bond. We shall pay the rent payable by us year after year in the *zemindari cutchari*, and the *mahajan* shall have no concern with it, and having paid the principal money in the month of Chait 1297 we shall take back the document and the land. In case we fail to repay the principal money at due date this *sudbharna* bond shall remain in force."

There is in this contract no agreement to repay the principal money, and therefore there would be no right to a money decree. It was contended that the provision as to taking back the document and the land on payment of the principal implied an agreement to repay the money. This is not so. That provision

1897
 LUCHMESHAR
 SINGH
 v.
 DOOKH
 MOCHAN JHA.

is merely what is generally known as a proviso for redemption. It fixes the minimum time within which the mortgagor can redeem. It does nothing more. This bond is, we think, an usufructuary mortgage within the meaning of section 58 (d) of the Transfer of Property Act. That clause is as follows :—

“Where the mortgagor delivers possession of the mortgaged property to the mortgagee, and authorises him to retain such possession until payment of the mortgage money, and to receive the rents and profits accruing from the property and to appropriate them in lieu of interest, or in payment of the mortgage money, or partly in lieu of interest and partly in payment of the mortgage money, the transaction is called an usufructuary mortgage, and the mortgagee an usufructuary mortgagee.”

This is exactly what has been contracted for here. The mortgagor delivered possession of the mortgaged property to the mortgagee, and authorised him to retain possession until payment of the mortgage money, and to receive the rents and profits in lieu of interest.

It remains to be seen what is the remedy of an usufructuary mortgagee. This is to be found in section 67, which, after detailing the general right of a mortgagee to foreclosure or sale, proceeds to except three cases from this general right. A simple mortgagee cannot sue for foreclosure ; a mortgagee by conditional sale cannot sue for sale ; an usufructuary mortgagee cannot as such, *i.e.*, unless there is anything in the contract which would imply the right, sue either for foreclosure or for sale. This is, we think, the natural meaning of the terms of section 67. Although the section speaks of instituting a suit, we are of opinion that those words do not so much relate to the form in which the suit is to be brought as to the remedy to which the plaintiff is entitled. It could not be that the words “to institute a suit for foreclosure or sale,” would only debar an alternative prayer and not bar either relief.

It remains to be seen whether there is anything in this bond which would exclude the operation of section 67. There is no express contract to submit to a decree for sale or to one for foreclosure. Can such a contract be implied ? We are unable to see in this bond anything, from which we may infer any such agreement.

Several cases on the subject were brought to our notice, and it may be well to refer to some of them.

The case of *Umda v. Unrao Begam* (1) is an express authority that the present suit is not maintainable. Three decisions of the Madras High Court were referred to. The first of these is *Venkatasami v. Subramanya* (2), and it seems to hold that an usufructuary mortgagee is entitled to a decree for sale. The terms of the mortgage are not given in that case, and the general proposition thus laid down was not followed.

In *Chathu v. Kunjan* (3) a Bench which included one of the learned Judges who decided the case in *Venkatasami v. Subramanya* (2) arrived at an opposite conclusion, and held that an usufructuary mortgagee cannot, in the absence of a contract to the contrary, sue either for sale or for foreclosure.

In *Ramayya v. Guruva* (4) another Division Bench held that where there was a covenant for payment of the money the mortgagee could bring the property to sale. These cases shew that, where the bond in question amounts to nothing more than an usufructuary mortgage as defined in section 58, there is no remedy either by way of sale or foreclosure. There being nothing in the present bond to differentiate it from a simple usufructuary mortgage as defined in the Act, we must hold that the suit fails.

In the other case all that is asked for is a money decree. There is not in the bond any provision by which the mortgagor binds himself to pay the money, and none of the conditions of section 68 of the Transfer of Property Act are fulfilled. The plaintiff is not entitled to a money decree.

It is not necessary for us to express any opinion as to whether he is entitled to any other decree, as up to now he has never asked for any other.

Both appeals are dismissed with costs.

S. C. C.

Appeals dismissed.

(1) I. L. R., 11 All., 367.

(2) I. L. R., 11 Mad., 88.

(3) I. L. R., 12 Mad., 109.

(4) I. L. R., 14 Mad., 232.