

1910.

PIROJSHAH  
BIKHAJI  
v.  
PESTONJI  
MERWANJI.

According to the latter, the caveator has no interest whatever in the property. But according to caveator No. 1, he and the alleged testator were sharers in the properties concerned. Therefore, to the extent of the share which this caveator alleges he has in the properties, he claims adversely to the testator. So also as regards caveators Nos. 2 and 3, the alleged testator claims complete ownership of the property by reason of a sale to him, whereas the caveators in question claim the properties as their own mortgaged to the testator. Therefore, that is an adverse interest claimed by them.

We confirm the order with costs.

*Order confirmed.*

R. R.

## APPELLATE CIVIL.

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

1910.

February 24.

DATTAMBHAT RAMBHAT JOSHI (ORIGINAL PLAINTIFF), APPELLANT, v. KRISHNABHAT BIN GOVINDBHAT JOSHI AND SIX OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.\*

*Transfer of Property Act (IV of 1882), section 67—Usufructuary mortgage—Debt payable within a fixed period—Expiry of the period—Mortgagee's right to an order for sale.*

Where under a usufructuary mortgage the mortgage debt is made payable within a fixed period, the mortgage is not purely a usufructuary mortgage and the mortgagee has, in the absence of a contract to the contrary, the right to an order under section 67 of the Transfer of Property Act (IV of 1882) that the property be sold after the debt has become payable.

*Mahadaji v. Joti*(1) and *Krishna v. Hari*(2), explained.

SECOND appeal from the decision of V. V. Phadke, First Class Subordinate Judge of Belgaum with appellate powers, confirming the decree of S. S. Phadnis, Second Class Subordinate Judge of Chikodi.

\* Second Appeal No. 425 of 1909.

(1) (1892) 17 Bom. 425.

(2) (1908) 10 Bom. L. R. 615.

The plaintiff sued to recover possession of the property in dispute or to recover the mortgage debt by its sale under the following circumstances:—The property belonged to the father of defendants 1 and 2 and grandfather of defendant 3. He mortgaged it to the plaintiff's father on the 29th October 1893. The mortgage-deed provided as follows:—

1910.  
DATTAMBHAT  
RAMBHAT  
v.  
KRISHNA-  
BHAT.

I have taken from you (a loan of) Rs. 300 (in words) three hundred of the Government coinage in cash for my private purposes. It is agreed that interest upon this should be at the rate of 12 (in words) twelve annas per cent. per mensem. As regards the period (of repayment) of this, I shall repay your money in two years from to-day. For this (amount) the following is mortgaged, namely, land *khata* whereof is in my name and which is situated in Mouze Nipani of Taluka Chikodi in Belgaum District, and land situated in Mouze Gavan, the *khata* whereof is in the name of Vasudevhat Balambhat, being lands held as Inam on account of *Joshipan*. The details of the same are as given below:—

\* \* \* \* \*

The lands thus described have been mortgaged to you and given into your possession. Accordingly, you are to cultivate (or lease out) the said four lands and enjoy them in lieu of interest. And you are to write off the profits that may be yielded, in the interest, and appropriate the same. I shall, on my personal responsibility, pay whatever balance of interest may remain. You are to pay me the surplus of profits of land, if any, remaining after the interest is paid off. Immediately after the expiry of the agreement, I shall, on the *prati-pada* (the first day) of the cyclical year, pay off the whole of your money and redeem the land, at the same time. I shall not interfere with the land within that time. I have received the said rupees in cash and given this mortgage-deed in writing duly and of my own free will. Dated the 29th of October, 1893.

On the 15th March 1907 the plaintiff brought the present suit alleging that possession of the property marked A in the plaint was made over to the mortgagee and the right of collecting rent with respect to the property marked B was also made over, that in this manner the mortgagee remained in possession of the mortgaged property till the end of the cultivating season in the year 1896-97, when he was forcibly dispossessed by the defendants and that since then they had been wrongfully in possession. Hence the present suit for the recovery of possession or of the mortgage debt by sale of the property. Defendants 4—6 were joined because they were puisne-mortgagees under defendants 1—3.

1910.

DATAMBHAT  
RAMBHAT  
v.  
KRISHNA-  
BHAT.

Defendants 1—3 contended that the mortgage sued on was a hollow transaction, that neither the plaintiff nor his father ever had possession of the land, that they mortgaged the property to the family of defendant 4 and that the claim was time-barred.

Defendants 4—5 set up the mortgage to them.

The Subordinate Judge found that the plaintiff could not recover possession of the property as the suit was not brought within twelve years of the mortgage, that he was not entitled to sell the property, the mortgage being usufructuary, and that the remedy for a personal decree against the defendant was time-barred as the suit was not brought within six years from October 1895 when the cause of action arose. The suit was, therefore, dismissed.

On appeal by the plaintiff the Appellate Judge framed two issues, namely: “(1) Whether the claim of plaintiff for the possession of the land is in time? and (2) Whether he can realize his money by sale of the mortgaged property?”

The findings in appeal on both the said issues were in the negative and the decree was confirmed. In the course of his judgment the Appellate Judge observed as follows:—

As regards the 1st issue, the mortgage-deed was executed on 29th October 1893, and the suit was brought more than 12 years after that date. Plaintiff alleged, however, that his father had possession of the property till 1896-97. The lower Court has carefully reviewed the evidence on the question of possession and has come to the conclusion that the mortgagee did not as a matter of fact obtain possession of the property.

\* \* \* \* \*

On the whole I agree with the conclusion arrived at by the lower Court and hold that the claim for possession not having been brought within 12 years from date of mortgage is barred by limitation.

As regards the 2nd issue, the question is whether the mortgage is simply a usufructuary mortgage. There are two contrary decisions of the Bombay High Court on the point. According to the ruling at 17 Bombay, page 425, the mortgagee would have the right to recover his money by sale of the property. In the later ruling (10 Bombay Law Reporter, page 615) a contrary decision has been arrived at. The lower Court has followed the later decision in preference to the earlier one, and I think that that is the only course open to Subordinate Courts until the point be again raised in the High Court. As the mortgage is only a usufructuary one, the mortgagee cannot recover his money by sale of the mortgaged property.

The plaintiff preferred a second appeal.

*H. G. Kulkarni* for the appellant (plaintiff):—The mortgage-deed in suit clearly contains a covenant to pay the mortgage debt within two years. Thus the transaction is not purely a usufructuary mortgage. It is a usufructuary mortgage and there being no condition to the contrary, the mortgagee is entitled to recover the amount by sale of the mortgaged property: *Mahadaji v. Joti*<sup>(1)</sup>. In *Krishna v. Hari*<sup>(2)</sup> there was no express covenant to pay the debt, therefore, that decision cannot govern the present case. The Madras High Court has in the Full Bench ruling in *Sivakami Ammal v. Gopala Savundram Ayyan*<sup>(3)</sup> taken a similar view about the right of the mortgagee to bring the mortgaged property to sale. The Bombay High Court also has taken the same view in *Parasharam v. Puttajirao*<sup>(4)</sup>.

*N. A. Shiveshwarkar* for respondents 1—3 (defendants 1—3):—The transaction is purely a usufructuary mortgage and that being so, under the terms of section 67 of the Transfer of Property Act a usufructuary mortgagee as such, unless there is anything in the contract which would imply a right, cannot sue either for foreclosure or sale: *Luchmeshar Singh v. Dookh Mochan Jha*<sup>(5)</sup>.

The mortgage transaction in *Parasharam v. Puttajirao*<sup>(4)</sup> was governed by section XV clause (3) of Regulation V of 1827. The mortgage transaction in dispute was effected in 1893. Therefore it is governed by the provisions of the Transfer of Property Act.

In *Krishna v. Hari*<sup>(6)</sup> it was held that a mere covenant to pay, unaccompanied by the hypothecation of the property, cannot alter the character of the mortgage and give the mortgagee a right to sell in the event of non-payment.

SCOTT, C. J.:—The question in this case is whether the appellant has a right to an order for sale of mortgaged property the subject of the mortgage-deed of the 29th October 1893.

The learned Judge of the lower Court has considered that there are two contrary decisions of this Court upon the point

(1) (1892) 17 Bom. 425.

(2) (1908) 10 Bom. L. R. 615.

(3) (1891) 17 Mad. 131.

(4) See ante p. 128.

(5) (1897) 24 Cal. 677.

(6) (1908) 10 Bom. L. R. 615.

1910.

DATTAMBHAT  
RAMBHAT  
v.  
KRISHNA-  
BHAT.

1910.

DAFTAMBHAT  
RAMBHAT  
v.  
KRISHNA-  
BHAT.

and that he was bound to follow the later ruling, and he has accordingly followed what he believed to be the effect of the judgment in *Krishna v. Hari*<sup>(1)</sup> in preference to one in *Mahadaji v. Joti*<sup>(2)</sup>. In giving this preference to the judgment in *Krishna v. Hari*<sup>(1)</sup> he has lost sight of the provisions of section 3 of the Indian Law Reports Act XVIII of 1875.

We think, however, that he has misread the judgment in *Krishna v. Hari*<sup>(1)</sup>, which was shown by the judgment of this Court in *Parasharam v. Putlajirao*<sup>(3)</sup>, to fall within a different class of cases to that in *Mahadaji v. Joti*<sup>(2)</sup>. In the last mentioned case, there was a distinct covenant to pay after five years from the date of the bond. In *Krishna v. Hari*<sup>(1)</sup> there was no covenant to pay the principal amount at any particular date. In the mortgage which we now have under consideration the mortgagor covenants "as regards the period of repayment of this, I shall repay your money in two years from to-day. For this amount the security is the land described below." It is, therefore, not a case of a purely usufructuary mortgage, but a case in which the mortgage-money has become payable by the mortgagor and therefore in the absence of a contract to the contrary the mortgagee has the right under section 67 of the Transfer of Property Act to an order that the property be sold.

We therefore reverse the decree of the lower Court and pass a decree for the plaintiff ordering that in default of the defendant paying the amount of principal and interest not exceeding *damdupat* within six months from this date, the property be sold and the proceeds of the sale paid into Court and applied in payment of what is found due to the plaintiff and that the balance if any be paid to the defendants or other persons entitled to receive the same.

The plaintiff will be entitled to add his costs of this suit to the mortgage debt.

*Decree reversed.*

G. B. R.

(1) (1908) 10 Bom. L. R. 615.

(2) (1892) 17 Bom. 425.

(3) See *ante* p. 128.