

1910.

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ADVOCATE
GENERAL
OF BOMBAY.

As to the fourth question: "Whether the gift over in the said Will contained on the death of the second defendant is valid or invalid, and if valid, who are the persons entitled to the said residue on her death and in what proportions, and for what interests," in my opinion the time has not arrived for answering that question.

The plaintiff's and the Advocate General's costs to be paid out of the estate as between attorney and client. The second defendant to have her costs out of the estate. Defendants 4 and 5 to have their costs out of the estate as between party and party. Defendants 3 and 6 to have one set of costs between them as between party and party.

Attorneys for plaintiff:—Messrs. *C. P. D. Cunha & Co.*

Attorneys for defendant 1:—Messrs. *Little & Co.*

Attorneys for defendant 2:—Messrs. *Mehta and Dalpatram.*

Attorneys for defendant 3:—Messrs. *Dadachanji and Pocha.*

Attorneys for defendants 4 and 5:—Messrs. *Jehangir, Gulabhai and Billimoria.*

Attorneys for defendant 6:—Messrs. *Jehangir, Mehta and Somji.*

K. McI. K.

APPELLATE CIVIL.

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

1911.
February 14.

MANILAL RANCHOD AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS,
v. MOTIBHAI HEMABHAI AND OTHERS (ORIGINAL DEFENDANTS),
RESPONDENTS.*

Civil Procedure Code (Act XIV of 1882), sections 268, 274—Usufructuary mortgage—Debt—Immovable property—Execution of money decree—Attachment.

Where a deed of mortgage with possession provided that the mortgagee was to enjoy the profits in lieu of interest for ten years and was to be redeemed on the expiration of the term by payment of the mortgage money,

* Second Appeal No. 707 of 1909.

Held, that the document created a purely usufructuary mortgage.

Held, further, that in the case of a usufructuary mortgage, there was no debt payable by the mortgagor to the mortgagee which could be attached in execution of a money decree against the assignee of the mortgagee, and that section 268 of the Civil Procedure Code (Act XIV of 1932) was not applicable to such a case. The procedure should be by attachment, under section 274 of the Civil Procedure Code, of the interest in immoveable property and its sale according to the provisions of the Code.

Tarvadi Bholanath v. Bai Kashi(1), explained.

SECOND appeal from the decision of J. L. Thakar, Judge of the Court of Small Causes at Ahmedabad with appellate powers, reversing the decree of M. J. Yajnik, Subordinate Judge of Umreth.

One Bhatha Samal mortgaged a piece of land under a registered mortgage-deed, dated the 10th February 1894, to one Shankar Bapuji for Rs. 750. The mortgage was with possession and it provided that the mortgagee was to enjoy profits of the land in lieu of interest for a period of ten years and was to be redeemed after the expiration of the term on payment of the mortgage money. The mortgagee Shankar Bapuji died in or about November 1902 and on his death his brother Jiva Bapuji got possession of the mortgaged property. Jiva's creditor, one Ranchod Hirachand, obtained a money decree, No. 460 of 1904, against him; and in execution attached Jiva's rights as mortgagee of the land. Thereupon, Jiva made an application stating that his deceased brother Shankar had taken the mortgage with money borrowed from one Hemabhai Dharamdas and that after Shankar's death, having assigned his mortgage rights to the said Hemabhai for the debt, neither he nor his deceased brother had any interest in the property. In spite of the said objection raised by Jiva, Ranchod Hirachand caused Jiva's rights as mortgagee to be sold at auction and purchased the same himself for Rs. 101 in September 1905. Subsequently, Ranchod Hirachand having died, his sons Manilal and Ambalal brought the present suit in the year 1903 to recover possession of the mortgaged property or to obtain such other relief as the Court might deem proper to grant alleging *inter alia* that on the 1st September

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1905 Bhatha Samal sold the mortgaged property with the mortgage burden on it to defendant 1, Pathak Devshankar Sadaram, and that Hemabhai Dharamdas was joined as one of the parties, he having purchased from Jiva Bapuji the mortgagee's rights.

Defendant 1, Pathak Devshankar Sadaram, answered that he had become the owner of the property in suit under his purchase from Bhatha Samal for Rs. 650, that out of the said consideration he paid Rs. 73 to his vendor and held the rest for payment to the mortgagee and that he was willing to pay the sum on account of possession to any one to whom the Court would order him to pay.

The defence of defendant 2 is immaterial to this appeal.

Defendant 3, Jiva Bapuji, contended that he was not in possession and was not a necessary party.

Defendant 4, Hemabhai Dharamdas, stated *inter alia* that Jiva sold his rights as mortgagee to the defendant on the 8th April 1906, that the plaintiff, by his auction purchase, acquired no right as his judgment-debtor Jiva had no interest in the property then and that the plaintiff purchased the property with notice of that circumstance.

The Subordinate Judge found that the plaintiffs' father acquired at the Court-sale held in September 1905 the right, title and interest of Jiva Bapuji as mortgagee of the land in suit, that the mortgage with possession to Shankar Bapuji by Bhatha Samal was proved, that the sale of the equity of redemption by Bhatha Samal to defendant 1 was not proved, that the sale-deed dated the 8th April 1906 and passed by Jiva to defendant 4 was proved and that the plaintiffs were entitled to recover possession. He, therefore, passed a decree directing the plaintiffs to recover possession.

Defendant 4 appealed, and he having died during the pendency of the appeal, his son Motibhai was brought on the record. The appellate Court reversed the decree and dismissed the suit holding that the plaintiffs had not shown that their father had, by his Court purchase, acquired the right, title and interest of Jiva as mortgagee of the land, for the following reason :—

Here the mortgage was with possession and was a usufructuary one which does not give a right for sale of the mortgaged property and the mortgagee was in possession. A mortgage with possession, and that too a usufructuary one, is beyond doubt, to my mind, immoveable property and an interest in immoveable property. Such a mortgagee's rights in the mortgaged land should have been attached as immoveable property under section 274 and sold as such and a purchaser of such rights cannot, in my opinion, prove his title without a sale certificate. Here there was no confirmation of the sale by the Court and no issue of a sale certificate.

The plaintiffs preferred a second appeal.

G. K. Parekh for the appellants (plaintiffs):—The view of the lower Court is erroneous. The plaintiffs' father purchased the mortgage-claim which carried with it the right to the possession of the mortgaged property. In a mortgage the principal thing is the debt and the security of the property is only an incident of the debt. Therefore the right to the mortgaged property passes with the debt: *Baldev Dhanrup Marvadi v. Ramchandra Balvant Kulkarni*⁽¹⁾, *Tarvadi Bholanath v. Bai Kashi*⁽²⁾, *Appasami v. Scott*⁽³⁾, *Debedra Kumar Mandel v. Rup Lal Dass*⁽⁴⁾.

L. A. Shah for respondent 1 (defendant 4):—The rulings relied on were cases of simple mortgage in which there is an existing debt and the security of the property. All cases are discussed in *Tarvadi Bholanath v. Bai Kashi*⁽²⁾, which shows that the principle of the rulings referred to applies only to simple mortgages. The cases of a mortgage with possession and a usufructuary mortgage would be quite different and would not be governed by the said rulings.

In the present case the mortgage is a purely usufructuary mortgage. The mortgagee has no right to demand the debt. Section 72 of the Transfer of Property Act is clear on the point. The mortgagee has the right to the property only. Such an interest is an immoveable property under the General Clauses Act (X of 1897) and the procedure laid down in section 274 of the Civil Procedure Code should have been followed.

(1) (1893) 19 Bom. 121.

(2) (1901) 26 Bom. 305.

(3) (1885) 9 Mad. 5.

(4) (1886) 12 Cal. 546.

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SCOTT, C. J.:—The respondent 1 is the assignee of the rights of a mortgagee under a mortgage-bond executed in the year 1894. The bond created a usufructuary mortgage with possession and provided as follows:—

“The field is given in mortgage on receiving on security thereof Rs. 750. The money bears no interest and no rent shall be payable for the field. The period is fixed at ten years. You may cultivate or sub-mortgage the field during this period. I have no right thereto. After the expiration of the fixed period when I repay the principal sum on the very day and in the very month in which I have received the sum, you may give up the field in Vaisakh in that year. You should pay dues, etc., and enjoy the produce. If anyone causes obstruction or hindrance then I am to be answerable for the amount due in such manner as you may ask me to be answerable.”

According to the rulings of this Court that document created a purely usufructuary mortgage and not a mixed mortgage of the character referred to in *Parasharam v. Pullajirao*⁽¹⁾. It created no debt in respect of which the mortgagor could be sued except in the event of a breach of the covenant for quiet enjoyment contained in the bond. This being so there was no debt due from the mortgagor which could be attached under the provisions of section 268 of the Code of 1882. The plaintiffs, however, as the holders of a money decree against the assignor of the respondent 1, purported to attach a debt of Rs. 750, due by the mortgagor to the original mortgagee whose representative was the plaintiffs' judgment-debtor, and having so attached the so-called debt, it was sold in execution and purchased by the plaintiffs.

It is contended on behalf of the respondent 1 that the attachment and sale gave the appellants no right to possession of the mortgaged land for which they sue, and that argument found favour with the learned Judge of the lower appellate Court.

We are of opinion that the lower Court's decision is correct. In the case of a purely usufructuary mortgage where there is no debt payable by the mortgagor, the procedure by attachment under section 268 is inapplicable. The procedure should be by attachment, under section 274, of the interest in immoveable

property and its sale in accordance with the provisions of the Code.

The pleader for the appellants has, however, relied upon the decisions of this Court in *Baldev Dhanrup Marvadi v. Ramchandra Balvant Kulkarni*⁽¹⁾ and *Tarvadi Bholanath v. Bai Kashi*⁽²⁾ in which the decisions of the Madras High Court in *Appasami v. Scott*⁽³⁾ and of the Calcutta High Court in *Debendra Kumar Mandel v. Rup Lall Dass*⁽⁴⁾ were followed.

It is to be observed, however, that the learned Judges in delivering judgment in *Tarvadi Bholanath v. Bai Kashi*⁽²⁾, were careful to point out that their decision was based upon the fact that the mortgagee was a mortgagee under a simple mortgage and was not in possession, and upon that ground the decisions in the other cases which we have been referred to may be distinguished from that now before us.

We, therefore, affirm the decree of the lower appellate Court and dismiss the appeal with costs.

Decree affirmed.

G. B. R.

(1) (1893) 19 Bom. 121.

(3) (1885) 9 Mad. 5.

(2) (1901) 26 Bom. 305.

(4) (1886) 12 Cal. 516.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

ANANDIBAI KOM RAM PAI (ORIGINAL PLAINTIFF), APPELLANT, v. HARI SUBA PAI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

1911.

February 21.

Hindu Law—Partition—Partial partition—Re-union.

Out of six co-parceners in a joint Hindu family, three separated under a deed of partition, from the rest who continued joint as before. The Court found on these facts that the last three persons either continued as before to be co-parceners or they must be held as having immediately re-united with each other after executing the deed of partition. In appeal it was contended that there was no finding by the Court as to an agreement to re-unite or any evidence recorded of such agreement:

* Second Appeal No. 699 of 1909.

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