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(1884) 12 AHC CK 0003

Allahabad High Court

Case No: None

Mahipal Kuar		APPELLANT
	Vs	
Sheoratan Kuar and Others		RESPONDENT

Date of Decision: Dec. 20, 1884

Citation: (1885) ILR (All) 258

Hon'ble Judges: W. Comer Petheram, C.J; Oldfield, J; Mahmood, J; Duthoit, J; Brodhurst, J

Bench: Full Bench

Final Decision: Disposed Of

Judgement

Duthoit, J.

A pre-emptive right is raised by the terms of the wajib-ul-arz in this case only upon the occurrence of a transfer of a share in the property of the mahal; and a simple mortgage, or mere hypothecation, is not, in my judgment, a transfer of property.

2. A transaction between borrower and lender by which, as in the case before us, the only covenant by the borrower, as regards the land, is that he will not sell or mortgage it elsewhere until the loan is repaid, is, in this part of India, commonly styled a "simple mortgage," and is so described in Mr. Maopherson''s work on The Law of Mortgage in Bengal and the North-Western Provinces, ed. 1868, p. 10. By such a transaction the land is pledged as collateral security only. Its effect is to create a charge upon--not to transfer--the property. The latter effect can only result from such a transaction when the mortgagee has put his bond in suit, has obtained a decree upon it, and has executed his decree by bringing the property to sale; and when that event occurs, the pre-empting co-sharer has his remedy. The transfer of the property may thus be long delayed, especially in the case of a loan conditioned for a term; and it is conceivable that meanwhile the co-sharers might remain in ignorance of the mortgage transaction. Certainly their communal relations would be in no way affected by it. The reason of the existence of a pre-emption clause in the administration-paper of a village is the avoidance of the unpleasantness which is likely to result from the intrusion of a stranger into the commune; and I fail to see

how a mere hypothecation can give rise to such unpleasantness.

3. My answer to this reference must be in the negative.

Brodhurst, J.

4. With reference to the definition of simple mortgage, as given in Mr. Maopherson''s work on Mortgages, and in Section 58 of the Transfer of Property Act, the deed of Sawan Sudi 10th, 1288 fasli (5th August 1881), which was considered by the parties to the suit to be a deed of hypothecation or simple mortgage, was, I think, rightly held by the lower Courts and by the referring Bench of this Court to be a deed of that description.

5. Along with the wajib-ul-arz, prepared 22 years ago, is a statement showing that transfers that had, at or about that time, taken place in the village in question, and that statement is, together with the wajib-ul-arz, referred to in the settlement officer''s order of the 15th August 1862. One of the entries in the statement seems clearly to relate to a simple mortgage, and from these connected documents, which I now have had translated, I am satisfied that it was the intention that the co-sharers should have the right of pre-emption in all cases of mortgage, whether usufructuary or otherwise, and my answer to the reference is therefore in the affirmative.

Oldfield, J.

6. Referring to the bond with reference to which the right of pre-emption is claimed, I find that it declares that a sum of Rs. 1,597 has been borrowed and is due to the obligee, and the obligors bind themselves to pay this sum with interest on a certain date, and they covenant as follows: "To secure this money, we have mortgaged a 5 gandas share out of a 10 gandas share in each of the villages Barigaon and Malhipur. So long as the principal amount with interest is not paid to the aforesaid bankers the hypothecated share will not be sold or mortgaged to any one, and if we do so, such act will be invalid; we have executed this hypotbecation-bond that it may be of use when needed."

7. This instrument is drawn up in a not uncommon form, and is of a character which I believe has always been recognized by our Courts as creating a simple mortgage.

8. The Transfer of Property Act has now defined a mortgage to be "the transfer of an interest in specific Immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability;" and a simple mortgagee is defined to be--"Where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage-money, and agrees, expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds applied, so far as may be necessary, in payment of the mortgage-money, &c.

9. The right of causing the mortgaged property to be sold is to be exercised by recourse to the Civil Court, as is indicated by Sections 85 to 90 of the Act, except in the cases mentioned in Section 69.

10. It appears to me that the instrument comes within this definition of a simple mortgage. It transfers, as I think, an interest in Immovable property for the purpose of securing payment of money lent, which the borrower binds himself personally to repay; and there is impliedly a power given to cause the property to be sold to satisfy the debt, and the fact that the right of sale must be exercised through the Civil Court makes no difference; the terms of pledge and mortgage used necessarily imply a right of sale over the property, for the obvious intention of pledging the property as security for the debt is that the debt should be realized by its sale, and the instrument would be meaningless and the intention of the parties would be defeated on any other construction of it.

11. The case of Shib Lal v. Ganga Prasad ILR 6 All. 551 may be referred to show that the Full Bench of this Court has held an instrument of a similar character to operate to create a simple mortgage within the meaning of the Transfer of Property Act. I hold, therefore, that the bond creates a simple mortgage; but I am nevertheless unable to hold that the plaintiff has a right of pre-emption in respect of it under the wajib-ul-arz. That document gives a right of pre-emption in respect of transfers by mortgage, but we have to see what was intended by such transfers, and I think the word used, which is translated "transfer," was not intended to refer to a simple mortgage, but to mortgages where possession of the property passes to the mortgagee. The object was to exclude strangers from coming in and meddling with the estate, and this does not happen in a case of simple mortgage.

12. When the property is ultimately sold under the order of the Civil Court, a right of pre-emption will arise, and the object of the shareholders can be obtained. It seems, therefore, probable that the parties to the wajib-ul-arz had in view cases of mortgage where possession of the property was transferred to the mortgagee, and I believe our Court has in many other cases placed this construction on similar terms in the wajib-ul-arz. The answer to the reference should be in the negative.

Petheram, C.J.

13. The question which has been referred to the Full Bench does not, in my opinion, arise in this case, and before the answer can be given, the question must, I think, be amended. The question which does arise in the case is, whether, having regard to the nature of the security created by the bond dated 10th Sudi Sawan 1288, and the terms of the wajib-ul-arz, any right of pre-emption arose in the borrower''s co-sharers upon his executing the bond. The answer to this question depends on whether the security created by the bond was a mortgage or a transfer within the meaning of the wajib-ul-arz. In my opinion it was neither the one nor the other.

14. By Section 58 of the Transfer of Property Act of 1882, a mortgage is denned to be a transfer of an interest in property for the purpose of a security, and a simple mortgage, which is the lowest form of security which can be defined as a mortgage, is defined to be where the borrower binds himself to pay the loan, and gives the lender a power to sell the property and pay himself in the event of the loan not being repaid when it becomes due. This transaction clearly includes the transfer of an interest in the property, as it transfers the right to sell it from the borrower to the lender.

15. A reference to Section 100 of the same Act shows that, according to the law of this country, Immovable property may be made the subject of a security by a transaction which may not be a mortgage, i.e., by a transaction which does not transfer to the lender any interest in the land itself. The question then comes to this--Does the bond in question, either expressly or impliedly, give the lender himself any right to cause the property to be sold; or, in other words, to sell it himself, as, if it does not, it transfers no interest in the property, and is not a mortgage but a Charge. I am unable to see that any such right is created or given by the bond; it is evident that no express right is created, and therefore it only remains to inquire whether one arises by implication from the nature of the transaction. I think that it does not. The strongest words in favour of such an implication are "mortgaged" and "hypothecated," and they must be read together with the other words by which the borrower agrees not to sell or mortgage the property to any other person until the bond is paid off. The meaning of this appears to me to be that the land is to remain in the hands of the borrower, subject to a charge upon it in favour of the lender, and, if this is the correct view, certainly no power to sell by the lender can be implied from such a state of things. It follows then that, in my opinion, the transaction in question amounted to a charge only, and not to a mortgage or transfer, and that the question as amended must be answered in the negative. It may be well to add that, in my view of the law, a simple mortgage, within the definition of the Transfer of Property Act, 1882, Section 58, would create a right of pre-emption under the terms of the wajib-ul-arz, because by giving the right to sell, it; would transfer an interest in the property; but, as I have before said, I do not think that question arises in the present case.

Mahmood, J.

16. The question referred to us relates to the interpretation of the 5th clause of the wajib-ul-arz, a document which was executed in the Hindustani language by the co-sharers of the village at the time of the settlement of revenue. The clause relates to the exercise of the right of pre-emption, and, in interpreting the words of the clause, it seems to me necessary to bear in mind the nature of the right for which the clause provides.

17. Sitting as a Judge of this Court, I have on more than one occasion expressed the view, that the rule of pre-emption owes its origin in India to the influence of

Muhammadan Jurisprudence, which for centuries governed the administration of justice in this country. Though originally a mere rule of law administered by the Courts, pre-emption has been adopted as a custom by village communities in various parts of India. They have in some respects altered the incidents of that right, but such alteration has almost invariably been in the direction of strengthening the right, removing its limitations, and extending it far beyond the original contemplation of the rule of Muhammadan Law. That law limits the exercise of the right of pre-emption strictly to cases of sale, whereby the ownership of property passes from one person to another; but in adopting the right, the village communities in India, prompted most probably by that feeling of exclusiveness and immiscibility of character which the Hindu system of caste and joint family has engendered in the Indian mind, have extended the rule of pre-emption to mortgages of all kinds and even to thinks leases, as is exemplified by some of the cases to be found in the reports. Bearing these matters in mind, it seems to me that the case now before us is only another illustration of the tendency to which I have referred; for here preemption is claimed, under the terms of the wajib-ul-arz, in respect of a transaction which, being only a simple mortgage, falls far short of sale, and does not involve the transfer of possession of the property to which it relates. It is true that in his plaint the plaintiff alleged that under the mortgage possession had been made over to the mortgagee, and the question has been decided against him by both the lower Courts. But the transfer of possession is by no means a condition precedent to the exercise of the right of pre-emption, even under the strict rule of Muhammadan Law,--a rule which, as I have already said, has been adopted by village communities by removing many of its restrictions. I am therefore of opinion that the circumstance that possession has not been transferred to the mortgagees is a circumstance which in itself has no bearing upon the decision of the question now before us. So long as the wajib-ul-arz provides the right of pre-emption in cases of all kinds of mortgage, the Courts must give effect to the terms of that document regardless of the question of possession.

18. This brings me to the consideration of the main question now before us. What is the exact meaning of the clause of the wajib-ul-arz? Does it give a right of pre-emption in respect of simple mortgages? The clause runs as follows: "According to the proportion of the land or share in possession, every sharer has the power of transferring rights and interests by means of sale and mortgage. But it is a condition that at the time of transfer whosoever may be desirous of transferring rights and interests, then first his nearest sharer will be entitled, and in case of his refusal, the transfer will be made in favour of other sharers in that thok, and in case of their refusal in favour of sharers in the other thok, and when all these refuse or decline to give the proper pried, then the transfer may be made in favour of others, and then no sharer will have the right of pre-emption."[1] In deciding this point it seems to me necessary to determine the exact meaning to be attached to three important words occurring in the clause of the wajib-ul-arz, viz., "hakkiyat" and

"rahn" and in determining their meaning, it seems to me that we are not called upon to enter into a philological discussion as to the origin and primary meaning of these words. The object of interpretation of documents of this nature is to ascertain the exact intention which the parties thereto had in using those words; and bearing this in mind, we are concerned only with the meaning of these words as they are used in the language of Hindustan. Now as to the word "intikal" the learned Pandit who has argued the case on behalf of the appellants insists that the word necessarily implies the passing of possession by virtue of an alienation; because, as he contends, the word is derived from the Arabic root "nakl" which means change of place. I do not dispute the philology, but if the primary meaning of the root were to be the guide of interpretation, it seems to me that the word as used in this country would become meaningless in the majority of documents wherein it occurs; because, even according to the argument for the appellants, a usufructuary mortgage amounts to an "intikal" (transfer) of Immovable property. Now if the primary meaning of the word is accepted as the guide of interpretation, I have only to say that, when the owner of Immovable property executes a usufructuary mortgage, the property does not move, in the literal sense of the word "nakl," from one place to another, and that it does not therefore change places in the sense in which the learned Pandit interprets the word "intikal." It is not contended that the word is used in the wajib-ul-arz in any sense peculiar to the locality where the document was executed; and I therefore take it that it is to be interpreted in the sense in which it is usually employed by the people of Hindustan. And taking this view of the matter, I have no hesitation in saying that the word "intikal," as used in Hindustani, has the broadest meaning in connection with "alienation" conveyance," "assignment," or "transfer" of rights in Immovable property. I will not undertake to say which of these English words is the nearest equivalent, but I can say that, whichever of these words has the widest possible meaning, that word is the true equivalent of the Hindustani word "intikal;" at least I am not acquainted with any word which has a broader meaning in the sense of transfer of interest in Immovable property.

19. Now as to the word "hakkiyat," the word is derived from the Arabic root "haq" the primary meaning of which is "truth." But it is not by that primary meaning of the word that I would interpret the wajib-ul-arz, for the word "haq," as it is used in Hindustani, means "right," and "hakkiyat" means that which is the subject of right, namely, rights and interests, in the legal sense of the phrase. Then the word "rahn" which is another Arabic word. But we are not concerned with the meaning which it has among Arabians or under the Muhammadan Law. The only question we are concerned with is what is the meaning of the word in the Hindustani language in which the clause of the wajib-ul-arz has been framed? It is to me as clear as the meaning of any word of my own language, that the word "rahn" is a generic word indicating all that is included in the English word "mortgage," as I understand the expression. The word is certainly not limited to usufructuary mortgages, but

includes simple mortgages also--the former being in Hindustani "rahn bii kabza," and the latter "rahn bila kabza" in other words, if the nature of the mortgage has to be specified, the expression "with possession" or "without possession" has to be employed to qualify the general expression "rahn" or mortgage.

20. Now I take it as a rule of construction that when general words are employed, they must be so understood, unless they are accompanied by any expression limiting and restraining their ordinary meaning, or unless such limitation or restriction arises from necessary implication. I have already said that neither the word "intikal" nor the word "rahn" can be understood in this document in any sense other than the most general; whilst the word "hakkiyat" has an equally general signification. Such being the view which I take of the meaning of these words, it becomes necessary for me to consider their effect with reference to the law of India. And upon this part of the case I have only to say a few words, because the codified provisions of Section 58 of the Transfer of Property Act (IV of 1882) have explained the law as it has always been in this country. I need not read that section; but I will only say that "mortgage," as understood in the Indian law, includes hypothecation or simple mortgage without possession, as well as usufructuary mortgage, which carries with it the right of possession, and that the one is as much "transfer of an interest in specific Immovable property" as the other, and that the purpose of both forms of mortgage is to secure the payment of money advanced as a loan to the person executing the mortgage. In my judgment in the case of Gopal Pandey v. Parsotam Das ILR 5 All. 121 to which the learned pleader for the respondent referred in the course of his argument, I dwelt at some length upon the conception which I have of the form of transfer known in India as hypothecation or simple mortgage without possession. I need not repeat what I then said, but I may briefly state the conclusions at which I then arrived, and to which I have ever since adhered. In this case we are not concerned with what is called an "English mortgage" in India. We have only to see whether the transaction now before us, which is one of the Indian simple mortgage, is in any jurisprudential sense distinguishable from usufructuary mortgage, so as to place the latter under the category of "transfer" of an interest in Immovable property, and to exclude the former from such denomination. I am anxious to address myself to this question, because an important part of the argument of the learned pleader for the appellants proceeded on the ground that, under the transaction which we are now considering, nothing was actually "transferred." Now, according to my conception of legal rights, ownership is simply the aggregate sum of certain rights which constitute its component elements. Among those are the rights of possession and enjoyment of produce and the right of sale; in other words, a full owner of Immovable property has the power to alienate the right of possession and enjoyment of produce, as well as the power of transferring to another person the right of sale. It seems to me then that, When the owner of property borrows money or incurs any other pecuniary obligation, and, as security for the due performance

of his engagement, gives a right in Immovable property as security, he may convey to his creditor such one or more elements of ownership as would secure the fulfilment of the pecuniary obligation. When he conveys the right of possession and enjoyment. of produce, it is a usufructuary mortgage; when he, whilst remaining in possession, transfers the right of sale, the transaction amounts to a simple mortgage in India. In both cases the transaction involves the transfer of someone or more of the component elements of ownership; in both cases the transaction amounts to a transfer, called mortgage, because in both cases the object of the transaction is to secure the discharge of a pecuniary liability by transferring an interest in Immovable property. The purpose of the transaction in both cases is absolutely identical, though the modus operandi for securing that purpose is different. In the case of a usufructuary mortgage, the mortgagee obtains possession and realizes profits towards payment of the mortgage debt; in the case of a simple mortgage his right consists of achieving the same result by bringing the property to sale by such procedure as the law of the land provides. In some cases, such as those described in Section 69 of the Transfer of Property Act the mortgagee may sell the property by private sale; in other cases (and this is the rule of simple mortgages in India) his only way of selling the property is to go to the Court to obtain an order for sale. I am of opinion that this distinction between the two forms of mortgage to which I have referred does not place them under different categories, for my conceptions of jurisprudence convince me that both must be classed under the genus of jura in re aliena, or estates carved out of the full ownership of property, the object, namely, security of Immovable property for the performance of a pecuniary obligation, being in both cases identical. For these reasons I hold that a simple mortgage, Such as the one now before us, falls within the contemplation of the clause of the wajib-ul-arz which we are now considering, and that the right of pre-emption accrued under that clause to the plaintiff in this case when the simple mortgage, of which he complains, was executed by one of his co-sharers in favour of a "stranger," in the sense in which that word is understood under the law of pre-emption.

21. I wish to say a few words more on a minor point which was suggested in the course of the argument. It was said that a simple mortgage in this country can never result in sale without the intervention of the Court; that when such a mortgage is enforced there must be a decree of Court; that such decree would be executed by auction-sale; and that at such auction-sale a co-sharer like the plaintiff could enforce a right of pre-emption u/s 310 of the Civil Procedure Code. This may be so, but it does not seem to me to have the least effect upon the determination of the question now before us. Provisions somewhat similar to those of Section 310 of the CPC are to be found also in Section 188 of the Land Revenue Act (XIX of 1873), but these statutory provisions confer pre-emptive rights wholly independent of the terms of the wajib-ul-arz, and I should say that they apply equally to cases in which the village community has entered into no such compact regarding preemption as

in the present case. In the present case we are not concerned with the statutory pre-emptive rights of a bidder at an auction-sale either in execution of a decree or for arrears of Government revenue. We are concerned only with the rights of a co-sharer under the specific terms of the wajib-ul-arz, which imposes restrictions on the transfer of interests in the lands of the village. Moreover, we are not called upon to decide whether the policy of the rule of pre-emption in the form in which it is here claimed and provided by the wajib-ul-arz is in itself wise. The wajib-ul-arz is admittedly binding upon all co-sharers--certainly upon the parties to the present suit--and if that document provides pre-emption in respect of simple mortgages, as I hold that it does, we are bound to give effect to its terms.

22. My answer to this reference is in the affirmative.