

(1879) 12 AHC CK 0004

Allahabad High Court

Case No: None

Phul Kuar

APPELLANT

Vs

Murli Dhar and  
Another

RESPONDENT

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Date of Decision: Dec. 5, 1879

Citation: (1880) ILR (All) 527

Hon'ble Judges: Robert Stuart, C.J; Straight, J; Spankie, J; Oldfield, J

Bench: Full Bench

Final Decision: Disposed Of

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### Judgement

Robert Stuart, C.J.

In this case it was objected by the defendants, respondents, and both the lower Courts have held, that the claim is one cognizable by a Small Cause Court, and that the Civil Court had no jurisdiction to entertain the case, seeing that, in their opinion, possession of the house for two years, as conditioned by the deed, does not confer such a mortgage-right as would entitle the mortgagee to realize the amount under it from the property. All that the mortgagee is entitled to sue for is Rs. 300, and for that purpose she ought to proceed in the Small Cause Court. On the other hand, it is contended by the plaintiff, appellant, that there is a good mortgage of the house to her, and her plaint shows that she has brought the suit for recovery of the Rs. 300, which is the mortgage-money, and interest, besides the rent, by auction-sale of the mortgaged house, and that the suit is therefore cognizable by the Munsif and not by the Small Cause Court. This is her only plea, and it is the sole question before us in this appeal. The following is the mortgage-deed:--(After setting out the deed of mortgage, the judgment continued):--If the first part of this deed stood by itself without reference to anything that was to follow, it might perhaps be fairly argued that what was really mortgaged was not the house itself, but only two years' use, of it. But even if so, there was a mortgage, a limited mortgage, and such a transaction is not within the terms of Section 6 of Act XI of 1865. Taken as a whole, however, the

transaction bears a wider aspect, for it states that the mortgagors "have put the mortgagee in possession of the thing mortgaged like ourselves," and it goes on to provide, "that we agree," i.e., we intend and promise, " that we shall pay the aforesaid sum in a period of two years and get," i.e., the mortgage-debt being then paid, we shall then get, "the thing mortgaged redeemed," and then comes a very important clause showing that the contingency of the debt not being paid within two years was kept in view, for it provided that," if we fail to pay the mortgage-amount within the period of two years, the mortgagee shall be at liberty to recover the mortgage-amount in any way he pleases," that is, he may either proceed against the mortgaged property or against the mortgagor personally, and it is added that, whatever is laid out by the mortgagee in repairing the house "shall be paid by us," not at the end of two years, but at the time of redemption of mortgage."

2. It is, therefore, quite clear to me that the deed is an ordinary simple mortgage-deed, by which the mortgagor's house in Ghaziabad is pledged as security for the mortgage-debt, the condition as to payment of the amount within two years pointing to a mere contingency as to the mortgagor's intentions, but in no way altering the legal character of the mortgagee's right under his deed. The precedent referred to by the Judge--*Dulli v. Bahadur* H.C.R. N.W.P. 1875 p. 55, does not appear to me to have any application to the present case. There the defendant failed to carry out his covenant to put the plaintiffs in possession of a zamindari share, in consequence of the estate being in the hands of a lessee who, of course, insisted on his own independent right, and the property itself was not mortgaged to secure the debt. Here we have a simple mortgage which undoubtedly secured the property to the mortgagee until his debt was paid, the two years' condition being merely in the nature of a contingent promise or expectation of releasing the property by payment of the debt within that time, and not otherwise limiting the plaintiff's rights under her security. Both the lower Courts are therefore clearly wrong in holding that the jurisdiction of the Munsif was ousted, and that the case could only be entertained by the Small Cause Court.

3. I would, therefore, allow the present appeal with costs, setting aside the judgment of both the lower Courts, and I would remand the case for disposal on its merits by the Munsif.

Spankie, J.

4. I cannot say that the decision of the lower Appellate Court is open to the objection taken by appellant. The terms of the mortgage-deed are not denied, and it appears that the mortgage was for two years, and for those two years the mortgagee was put in possession as security for the interest rather than the principal. The mortgagors put the mortgagee in possession of the subject of the mortgage, and agreed to pay interest at eight annas a month, as well as the monthly rent. If they fail to pay the amount of the mortgage-money within the period of two years, the

mortgagee would be at liberty to recover it in any way he pleased, but the deed does not provide that the house at the expiration of two years shall remain hypothecated for the payment of the money. It is admitted that the mortgagee has been put out of possession, and she now seeks to recover the amount of the money due to her by sale of the mortgaged property. The amount in suit is under Rs. 500, and the Courts below have held that there was no real security for the payment of the principal, and therefore that there could be no decree for the sale of the mortgaged property. The claim then became one cognizable by a Court of Small Causes. It was therefore dismissed.

5. The precedent relied on by the lower Appellate Court--Dulli v. Bahadur H.C.R. N.W.P. 1875 p. 55, appears to be in point. The judgment is one to which I myself was a party, and I consider myself bound by it. But regretting that I differ from the honourable and learned Chief Justice, I am quite willing, if he should be disposed to refer it, that the case may go before another Judge. At present I would dismiss the appeal and affirm the judgment with costs.

6. The Judges of the Division Bench differing on a point of law, the appeal was referred u/s 575 of Act X of 1877 to Oldfield and Straight, JJ. The Judgment of these Judges was delivered by

Oldfield, J.

7. The question which we have to determine is whether under the terms of the deed, dated the 6th November 1868, a mortgage was created in plaintiff's (appellant's) favour by reason of which she is entitled to recover the amount she claims by sale of the house alleged to be mortgaged.

8. In our opinion there can be no doubt that the deed creates a mortgage of the house as security for payment of the principal sum, Rs. 300, lent, and that the plaintiff is in consequence entitled to recover by sale of the mortgaged property. A pledge is created by the terms, "We, Murli Dhar and Sagar Mal, sons of Ram Lal, do hereby declare that we have mortgaged a house situate in Ghaziabad, bounded as below, and possessed by us, in lieu of Rs. 300, half of which is Rs. 150, to Kashi Ram and Ganga Ram for two years," and the deed goes on to stipulate, "if we fail to pay the mortgage amount within the period of two years the mortgagee shall be at liberty to recover the mortgage-amount in any way he pleases." It is true that a term of two years is entered as the term of the mortgage, but this term is named with reference to the period within which the obligor was bound to satisfy the debt, and before the expiry of which the obligee could not demand payment, and it is obvious that the object of the mortgage would be frustrated if it were held to cease after two years, whether the debt be satisfied or not. The case on which respondents rely and which is referred to in the judgments of the Courts is distinguishable from the one before us. In that case the mortgage was a usufructuary mortgage for a term of years, and no question arose as to the right to bring the mortgaged property to sale

in satisfaction of the debt. The only question decided was that the mortgagee could not retain possession of the mortgaged property after the term of the usu-fructuary mortgage had expired. In the case before us, the deed cannot be held to pledge the house for the payment of interest, and so far the claim to recover interest as secured by the mortgage of the house will fail. An order will be made in the form proposed by the learned Chief justice for remanding the case for disposal on its merits. The costs of the appeal to this Court and of the Courts below will follow the result.