

1950 SCC OnLine Gau 67 : AIR 1950 Assam 107

Assam High Court  
(BEFORE THADANI, C.J. AND RAM LABHAYA, J.)

Dharameshwar Sarma ... Appellant;

*Versus*

Lakhyadhar Bargohain ... Respondent.

Second Appeal No. 1554 of 1947

Decided on January 16, 1950

The Judgment of the Court was delivered by

RAM LABHAYA, J.:— This appeal arises out of a redemption suit which was decreed by the trial Court. Plaintiff was granted a decree for possession without payment of any money as the defendant (mortgagee) having remained in possession for over 12 years from the date of the mortgage was held not entitled to any mortgage money by reason of provisions contained in the Assam Moneylenders (Amendment) Act 1943.

2. On appeal, the learned Additional Subordinate Judge giving effect to the defendant's plea held that mortgaged land had been sold to the defendant mortgagee on 23rd December 1934 in consideration of the mortgage loan and one bighs of the land which the mortgagee had transferred to the mortgagor and that the mortgage had been extinguished by conduct of the parties. As a result of this finding he dismissed the plaintiff's suit. He has come to this Court on second appeal. The land in suit was mortgaged to defendant-respondent by registered mortgage deed. The mortgage was for Rs. 500 and for a period of three years. Possession was handed over to the mortgagee who was to pay the land revenue. The mortgagor agreed to pay the money within the stipulated period of three years and agreed further that on his default the mortgagee would be entitled to enjoy the land as security for the money. But he reserved to himself the right to get the land released on payment of the money.

3. The defence set up was that on plaintiff's failure to repay the loan of Rs. 500 within the stipulated period fixed in the mortgage deed, plaintiff sold the mortgaged land to the mortgagee in consideration of the mortgage debt and a bigha of defendant's land which was transferred to the plaintiff. Reliance was placed on certain copies of chitha, Exs. (b) and



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(c) and endorsements on these documents. These endorsements show that on the basis of plaintiff's admission to the effect that the mortgaged land had been sold to the defendant, land was mutated in the name of the mortgagee in possession. Since then defendant-respondent has remained in possession.

4. The correctness of the order of the learned Subordinate Judge has been assailed on the ground that there was no valid sale either of the land or of the equity of redemption and plaintiff was thus entitled to the redemption of the property and his right of redemption was not lost or extinguished. If land was sold for a consideration of Rs. 500 plus one bigha of land, the sale could only be by a registered document. An oral sale followed by a mutation would not confer any valid title on the vendee. If the transaction is treated as a sale of the 'right to redeem or the equity of redemption'

then too the sale was of intangible property and could be made only by a registered instrument. In either one, therefore, there was no sale by which the right of redemption could be extinguished or destroyed.

5. In support of the contention that a sale of the equity of redemption is a sale of intangible property, the learned counsel relied on *Hushmat v. Jamir*, 23 C.W.N. 513 : (A.I.R. (6) 1919 Cal. 325), *Ramasami v. Chinnal Asari*, 24 Mad. 449, *Mathura Prasad v. Chandra Narayan*, 48 I.A. 127 : (A.I.R. (8) 1921 P.C. 8) and on the dissenting judgment of Sulaiman, J. in *Sohanlal v. Mohanlal*, 50 ALL. 986 : (A.I.R. (15) 1928 ALL. 726 F.B.). The learned counsel for the respondent contended, relying on *Pir Bakhsh v. Mangal*, 16 P.R. 1892 F.B. and *Pitambar Khemji v. Rajaram*, 60 Bom. 220 : (A.I.R. (23) 1936 Bom. 175) that what was sold was the right to redeem the property in consideration of one bigha of the land. The sale was of tangible property and as the plaintiff-appellant had not shown that it was for more than Rs. 100, the sale was valid. He further pointed out that such delivery of possession as was possible in the circumstances of case had been effected and no registered deed was necessary to complete the sale.

6. The case of the defendant in the trial Court was that the land was sold to him in consideration of the original debt and a bigha of land. In *Pir Bakhsh v. Mangal*, 16 P.R. 1892 F.B., where occupancy rights in land which had been mortgaged for Rs. 400 were sold absolutely on payment of a further sum of Rs. 99 by the mortgagee, a Full Bench of the Punjab Chief Court held on a true construction of the document the sale was of the equity of redemption for a sum of Rs. 99. The Bombay case *Pitambar Khemji v. Rajaram*, 60 Bom. 220, also lends support to this view. The contrary view was, however, expressed in a Calcutta case *Barsik Nandi v. Gurdas Pal*, 46 C.L.J. 573 : (A.I.R. (15) 1928 Cal. 107) where it was held that a sale by a mortgagor of all his right and interest in the immoveable property subject to the mortgage, in consideration of the mortgagee foregoing his right to recover the mortgage debt and the interest thereon, must be registered where the mortgage debt exceeded one hundred rupees even though the value of the mortgaged property was less than one hundred. I am inclined to the view which prevailed with the Full Bench of the Punjab Chief Court. The mortgagor can sell only his right to redeem when the property is under a mortgage. In essence the sale is of his existing interest in the property. He cannot sell what he himself does not own or possess. His right is compendiously described as the right to redeem, or the equity of redemption. The sale in this case, therefore, would really be that of the equity of redemption.

7. This leads us to the question whether sale of the equity of redemption is sale of tangible or intangible immoveable property. The learned counsel for the respondent emphasizes that the right to redeem, which is also described as the equity of redemption is tangible property and its sale is covered by R. 54, cl. (3) of the Transfer of Property Act, which provides that in the case of tangible immoveable property of the value of less than one hundred rupees, the transfer may be made either by a registered instrument or by delivery of property. He urges that the requirement of the section as regards delivery was satisfied by the mutation proceedings to which the plaintiff was a party. The word 'tangible' has not been defined in the Act. The section appears to divide immoveable property into three categories, viz., (1) tangible immoveable property of the value of Rs. 100 and upwards, (2) reversion or other intangible things and (3) tangible immoveable, property of a value of less than Rs. 100.

8. Reversion and other intangible things are also treated as immoveable property. In the case of tangible immoveable property of the value of Rs. 100 and upwards and also in the case of a reversion or other intangible things, the sale only can be made by a registered instrument. So far as the third category is concerned, viz., tangible

immoveable property of a value of less than Rs. 100 the transfer may be made either by a registered instrument or by delivery of property. The manner in which delivery of tangible immoveable property is to take place is also specified in the section. It is effected when the seller places the buyer, or such person as he directs in possession of the property.

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9. The word 'tangible' occurring in the section, according to its dictionary meaning connotes something perceptible to touch. It follows, therefore, that it should be capable of being touched. It should admit of possession or that it should be capable of being possessed. It should be such that it could be delivered by one person to another. It is for this reason that in this class of cases delivery of property or change of possession is taken as a substitute for registration. In the case of a mortgage where the mortgagee is in possession, the mortgagor has no right to immediate possession or enjoyment of the profits of the property. He can recover possession only on payment of the mortgage money. His right is not capable of being touched or possessed. Its possession cannot pass. A transfer of the right of redemption is the transfer of a right in property as distinguished from the property itself. The property is in the possession of the mortgagee. The mortgagee can sell his right and can part with possession. He can deliver it to his transferee. When selling mortgagee rights, he is selling something tangible. Similarly, a mortgagor who has borrowed money on the security of the property but is having the property in his possession, may sell the property and may deliver it. He is then selling the property and delivering its possession. It is tangible property then. But a mere sale of the right to redeem cannot be regarded as a sale of tangible immoveable property if the word 'tangible' is taken in its literal or dictionary sense and no other meaning can be given to it in the absence of any definition of the word by the Legislature. This was the meaning assigned to the word 'tangible' by Sulaiman, J. in *Sohanlal v. Mohanlal*, 50 ALL. 936 : (A.I.R. (15) 1928 ALL. 726 F.B.). The view also finds support from *Hushmat v. Jamir* 23 C.W.N. 513 : (A.I.R. (6) 1919 Cal. 325) and *Ramasami v. Chinnal Asari*, 24 Mad. 449.

10. In *Hushmat v. Jamir*, 23 C.W.N. 513 : (A.I.R. (6) 1919 Cal. 325), land was mortgaged to the defendant on the stipulation that he was to remain in possession for a fixed period in satisfaction of the debt and interest. Subsequently the mortgagor sold one out of two plots mortgaged to the defendant and thus paid off the mortgage and took back the other plot. The sale was by an unregistered document. The mortgagor sued for the recovery of possession. It was held that the property being in possession of the mortgagee, the sale was of the equity of redemption and being a sale of an intangible thing, could under a 54 of the Transfer of Property Act, be effected only by a registered document. Walmaley, J. was further of the view that the sale was nevertheless ineffective for want of delivery of possession. Bhashyam Ayyangar, J., also gave expression to the same view vide: *Ramawami v. Clainnal Asari*, 24 Mad. 449 on p. 463

11. The learned counsel for the appellant has also referred us to the observations of Viscount Finly in *Mathura Prasad v. Chandra Narayan*, 48 I.A. 127 : (A.I.R. (8) 1921 P.C. 8). The observations relied on appear on page 132 of the report and are as follows:

"Their Lords nips cannot accept the suggestion made on behalf of the appellants that for the purposes of S. 54, some sort of constructive possession resulting from

the delivery of the alleged instrument of transfer might be sufficient. For this purpose there must be a real delivery of the property."

12. The learned counsel has argued that their Lordships distinguished constructive possession from actual delivery which S. 54 insists on. He derived support from these observations for showing that a thing which was not capable of delivery, could not be regarded as tangible.

13. The above view did not find favour with the majority of learned Judges composing the Full Bench of the Allahabad High Court in *Sohan Lal v. Mohan Lal*, 50 ALL. 986 : (A.I.R. (15) 1928 ALL. 726 F.B.) The majority view was followed in *Phequ Mian v. Syed Ali*, 15 Pat. 772 : (A.I.R. (24) 1937 Pat. 178) and in *Tukaram v. Atmaran*, A.I.R. (26) 1939 Bom. 31 : (I.L.R. (1939) Bom. 71).

14. In the Allahabad case, the mortgage was usufructuary. It was for a sum of Rs. 1000. A deed of sale was executed in respect of the mortgaged property by the mortgagor in favour of the mortgagee for a sum of Rs. 90. The deed was not registered. After the death of the mortgagor, his heir professed to sell the properties to the plaintiffs in that case. They brought a suit for redemption. The learned Judges were of the view that it was not necessary to determine the nature of the property which was transferred, subsequently by the mortgagor's heir. But as the question whether a mortgagor's estate is tangible immoveable property or an intangible property had been debated at the Bar, they thought it proper to say something on the point. The remarks, therefore, are obiter. The majority view was that the owner of immoveable property who has parted with some of his rights in the shape of mortgage and lease remains still the owner of the property. There can be no objection to this view. The mortgagor no doubt retains ownership of the property even after he has mortgaged it with possession to someone else. The learned Judges then proceeded to hold that if the mortgagor makes a transfer of his interest, he makes a transfer of the property itself and not merely of an abstract right or of certain rights out of his total bundle of rights originally owned by him. With great respect to the learned



Judges, I find it difficult to agree with this view. The mortgagor can only transfer his right and interest which he has at the time of sale. He cannot sell anything more. When considering whether a sale is of tangible immoveable property or intangible immoveable property, the right and interest of the seller on the date of the sale is to be considered. That would be the determining factor. The mortgagor sells his interest and his interest is merely the right to redeem. It may not be confused with the equity of redemption though it is often described as the equity of redemption. The right of redemption is a legal right in India. This right is heritable as well as alienable. If sold, the transferee gets the right to redeem the property on payment of the mortgage money. The right of redemption may be owned by the transferee but it cannot be possessed as land or a house or other admittedly tangible property can be. I can discover no warrant for the proposition that a mortgagor who may be described as the owner of the property without the right of immediate possession when selling his right is selling the property. An owner may agree to a curtailment of his right by agreement and where such a curtailment of right has occurred by a transaction of mortgage or lease, the owner merely sells the residue of ownership which is still his. In this view of the matter there can be no difficulty in coming to the conclusion that the sale of a mortgagor's estate or his right to redeem is no more than the sale of something intangible.

15. The learned Judges pointed out a difficulty which would arise if this view was

accepted. They pointed out that in the case of a simple mortgage, the mortgagor would sell tangible property and in the case of a usufructory mortgage, the mortgagor would sell something intangible. This distinction they thought could not be made on principle. The mortgagor in the two cases could not be in a different position. Far from being a difficulty in the case, it seems to me that the interests of the mortgagor in the two cases are distinct and they cannot be placed in the same group or class. In a simple mortgage, the mortgagor has got possession of the property. He may sell the property and he may deliver its possession. A tangible thing passes by such transaction but the same cannot be said in the case of the right of a mortgagor who has given his property to another by way of mortgage with possession.

16. The Patna and the Bombay cases do not give new or different reasons for the view that a mortgagor's estate even when the property is in the possession of a mortgagee is tangible immoveable property within the meaning of Section 54.

17. After a careful consideration of the arguments on both sides I feel no hesitation in adopting the view that the mortgagor's estate or his right to redeem where property is in the possession of a mortgagee is something intangible and its sale is possible only a registered instrument. In this view of the matter, it is not necessary to consider whether the delivery of possession has taken place in this case as required by law. The property being intangible could not be validly transferred by mere delivery of possession even assuming that it did take place in the manner required by law.

18. A second contention Raised by the learned counsel for the respondent was that the vendee in this case was protected by the provisions contained in Section 63-A of the Transfer of Property Act. We find no force in this contention. Section 63A applies only in cases where a person contracts to transfer for consideration any immoveable property by writing signed by him or on his behalf. In this case the transaction is admittedly oral. There is no written agreement and the mere admission of the mortgagor before the revenue authorities even though in writing cannot be regarded as a written contract between the parties. The statement also does not give all the terms of the transfer. Even the consideration is not mentioned. The case, therefore, does not fall within the ambit of Section 63A.

19. The third contention was raised somewhat faintly. It was to the effect that following the mutation in defendant's favour a patta was issued in his favour by the revenue authorities under the Assam Land and Revenue Regulation and this patta amounted to a settlement which could not be challenged in a civil Court. Reliance was placed on R. 154(1)(a) of the Assam Land and Revenue Regulation, which debars civil Courts from exercising jurisdiction if questions as to the validity or effect of any settlement or as to whether the conditions of any settlement are still in force are raised. This section comes into operation only if there is no express provision in the regulation to the contrary. Section 39 of the Regulation is such a provision and affords a complete answer to the contention. This section provides that no person shall, merely on the ground that a settlement has been made with him, be deemed to have acquired any right to or over any estate, as against any other person claiming rights to or over that estate. If, therefore, a settlement was granted to the defendants and they had no legal right in the property, it would be competent to the civil Court not only to declare the title of the plaintiff but also to put him in possession by ejectment of the defendant. This was the view taken in *Askar Mian v. Sahed Ali*, 23 C.W.N. 540 : (A.I.R. (5) 1918 Cal. 21)



and I entirely agree with it. It was in view of the language of S. 39 of the Regulation



and the decision in *Askar Mian v. Sahed Ali*, 23 C.W.N. 540 : (A.I.R. (5) 1918 Cal. 21), that the learned counsel did not press the point seriously.

20. The last contention was that the mortgage in this case is not usufructuary and therefore it is not hit by the provisions contained in the Assam Moneylenders' (Amendment) Act, 1943. The contention is sound. The mortgage in this case is anomalous. It was for a period of three years. The possession was given to the mortgagee but there is a provision to the effect that if the mortgagor failed to pay the mortgage money within the stipulated period of three years, the mortgagee would be entitled to enjoy the mortgage land as security for the money. A covenant to pay the mortgage money exists in the mortgage deed. It is there in express terms or at least by necessary implication. The mortgage, therefore, is a combination of a usufructuary and a simple mortgage and as such can only be described as anomalous. The plaintiff, therefore, cannot redeem the property without payment of the mortgage money. The case does not fall under Section 5(2) of the Assam Moneylenders' (Amendment) Act of 1943 which covers usufructuary mortgages only. The result is that though plaintiff is entitled to redeem, he cannot do so without paying the mortgage money.

21. In my opinion, therefore, the plaintiff can be given a decree for redemption on payment of the mortgage money. In the circumstances of the case I would leave the parties to bear their own costs.

THADANI, C.J.:— This is a second appeal from the judgment and decree of the learned Additional Subordinate Judge, A.V.D., dated 21st January 1947 by which he set aside the judgment and decree of the trial Court which had decreed the plaintiff's suit for redemption, with no order as to costs.

22. The plaintiff-appellant brought a suit for redemption of the property in suit, mortgaged with possession to the defend and respondent by a registered deed, dated 16th February 1928. The appellant sought to redeem the mortgage with, out payment in virtue of the provisions of the Assam Moneylenders' (Amendment) Act of 1943, and further made a claim for Rs. 100 as mesne profits.

23. The defence to the suit was that the mortgaged property was sold to the defendant in 1934 in terms of the mortgage-deed which provided that the property will stand transferred to the mortgagee as owner on the failure of the mortgagor to discharge the mortgage debt within the stipulated period.

24. On the pleadings, the trial Court framed the following issues:

1. Did the plaintiff validly sell the mortgaged Hand on 27th January 1936 and if so, has the plaintiff lost the right of redemption?
2. Is the plaintiff entitled to the mean profits claimed?
3. Is the suit bad for misjoinder of causes of action?
4. To what other relief is the plaintiff entitled?

25. As a result of its findings, the trial Court decreed the appellant's prayer for redemption of the mortgaged property, but did not award to the plaintiff mesne profits.

26. The lower appellate Court, however, came to the conclusion that having regard to the documentary evidence adduced by the mortgagee, such as Exs. BCB (2) and C (1), the mortgagee had succeeded in proving that delivery of the property was made to him in pursuance of a contract to sell the property in suit. The lower appellate Court stated that Ex. B(1) shows that the mortgagor sold 6B. OK. 2L, the subject matter of the mortgage, to the mortgagee, and the recital contained therein empowered the mortgagee to get a patta in his own name for this land; Ex. B(2) shows that the mortgagor sold this land to the mortgagee, and the Mahdal who wrote the endorsement, Ex. B(2), has supported the mortgagee's case that Ex. B(2) was written at the instance of the mortgagor. It also relied upon the fact that the revenue

authorities partitioned the lands covered by the patta in 1936; the mortgaged lands were taken out from the mortgagor's patta and entered in the patta of the mortgagee; that the Sub-Deputy Collector entered the names in the mutation register in accordance with the partition in consultation with the mortgagor and the mortgagee. The lower appellate Court also relied upon the fact that the sale included not only the mortgaged land but one bigha, which was not the subject-matter of the mortgage, and this was later in 1936 partitioned with the consent of the mortgagor and delivery of the partitioned property consisting of the mortgaged land and the one bigha which was not the subject-matter of the mortgage, was made to the mortgagee in pursuance of the partition.

27. Two questions arise for decision in this appeal: (1) Whether the right to redeem is tangible or intangible property? (2) Whether the delivery of the property agreed to be sold was on the facts of this case made within the meaning of Section 64 of the Transfer of Property Act? These were the only questions pressed before us, the value of the property agreed to be sold as being of the value of less than hundred rupees not being disputed either in the Courts below or before us.

28. The Allahabad High Court in *Sohon Lal v. Mohan Lal*, 50 ALL. 986 : (A.I.R. (15) 1923 ALL. 726 F.B.)



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had occasion to consider the be questions. All the three learned Judges were agreed that there could be no delivery of possession within the meaning of Section 54 of the Transfer of Property Act, in respect of property agreed to be sold by the mortgagor to the mortgagee while the property was held by the mortgagee under a usufructuary mortgage. But on the question whether the right to redeem was tangible or intangible property, Mukerji and Kendall, JJ., took the view that

"the sale by a mortgagor of his interest in property of which he has made a usufructuary mortgage, is a sale of tangible immovable property."

29. Sulaiman A.C.J., made a distinction between a simple mortgage and a usufructuary mortgage, and took the view that in the case of usufructuary mortgage, the mortgagor had no right to immediate enjoyment of the property and observed;

"A mortgaged property itself is undoubtedly 'tangible', but the interest of the mortgagor in the property, when the mortgage is usufructuary, is not identical with the property itself, as some interest has already passed to the mortgagee, including the right to remain in possession and appropriate the profits. The interest which the mortgagor possesses is not itself capable of being touched nor is it such that an actual delivery of its possession can be effected by the mortgagor to the mortgagee. It seems difficult to conceive of a thing as being tangible when it is not capable of actual delivery of possession. Although, therefore, the mortgagor is the legal owner of the usufructuarily mortgaged property, whatever rights he possesses, so long as the mortgage subsists, cannot be treated as 'tangible'.... No case has been cited before us where it has ever been suggested that the interest of a mortgagor in the case of a usufructuary mortgage is 'tangible' immovable property. On the other hand, there are numerous authorities to the effect that such an interest is intangible." *Rahmat Ali v. Mahomed Mazar Hasan*, 11 A.L.J. 407 at pp. 409-10 : (19 I.C. 818); *Ramasami Pillai v. Chinnan Asari*, 24 Mad. 449 (463); *Mahendra Bahadur Singh v. Chandra Pal Singh*, 24 O.C. 155 : (A.I.R. (8) 1921 Oudh 124) *Hushmat v. Jamir*, 52 I.C. 558 : (A.I.R. (6) 1919 Cal. 325).

30. It is plain that Sulaiman, A.C.J., was influenced by the fact that no authority

had been brought to his notice in which it held that a right to redeem a usufructuary mortgage is 'tangible' property, A few years later in 1935, the Patna High Court had occasion to consider this question in *Pheku Mian v. Syed Ali*, 15 Pat. 772 : (A.I.R. (24) 1937 Pat. 178). Khaja Mohamad Noor, J., delivering the judgment of the Division Bench, observed:

"Taking up the first point, namely, whether the right left in a mortgagor after he gives his property in usufructuary mortgage, is an intangible or a tangible property, the learned Advocate has referred us to a decision of the Calcutta High Court in the case of *Hushmat v. Jamir*, 23 Cal. W.N. 513 : (A.I.R. (6) 1919 Cal 325). Where it was held that the sale of equity of redemption which was an intangible thing could, under Section 54 of the Transfer of Property Act, be effected only by a registered document.".... "On the other hand, there is a decision of a Full Bench of the Allahabad High Court in the case of *Sohan Lal v. Mohan Lal* 50 All 936 : (A.I.R. (15) 1928 All 726) where Mukerji and Kendall, JJ. held that the sale by a mortgagor of his interest is the property which he has given in usufructuary mortgage, is the sale of a tangible immovable property. Now the term 'equity of redemption' is a remnant of the old doctrine of English law where the mortgagor after having mortgaged his property lost all legal rights therein and the only right which was left to him was the equitable right of redemption which he could enforce only in equity Courts. This distinction of legal and equitable rights was never recognised by the Indian Legislature where the right of both the mortgagor and the mortgagee in a mortgaged property is a legal right determined by the statute. Strictly speaking, in India the term equity of redemption is misapplied to the right of the mortgagor. Under the Indian law, mortgage is a transfer of interest to an immovable property and not a transfer of the property itself. There is some interest left in the mortgagor and that interest is in the tangible property."

31. Khaja Mohamad Noor, J. then quoted with approval a passage in the judgment of Mukerji, J. in the case reported in *Sohan Lal v. Mohan Lal*, 50 ALL. 986 : (A.I.R. (15) 1928 All. 726 (F.B.)). The passage reads:

"In the case of a mortgage in England, as pointed out by that erudite jurist, Holland, the mortgagee, from the date of the mortgage, becomes the 'legal' owner of the property and nothing is left in the mortgagor except what has been called 'a bare equity of redemption'. The Indian Legislature has intentionally refused to import the expression 'equity of redemption', and for ample good reasons. It had, however, to use the expression 'right to redeem' (see Section 60 of the Transfer of Property Act). But the expression has been used in an entirely different sense. A 'right to redeem' is not the same thing as 'an equity of redemption' in England. In India, a host of people, besides the mortgagor himself, are allowed to exercise the right of redemption (see Section 91 of the Transfer of Property Act). One of these persons is a judgment-creditor of the mortgagor. Certainly, the interest of a judgment-creditor of the mortgagor and the interest of the mortgagor himself in the property mortgaged are not identical. It would, therefore be very wrong to substitute the expression 'right to redeem' for the English expression of 'equity of redemption', and then to say that the 'right to redeem' possessed by a mortgagor is an intangible property."

32. Khaja Mohamad Noor, J., then referred to the case of *Dawood Saheb v. Moideen Batcha Sahib*, A.I.R. (12) 1925 Mad. 566 : (87 I.C. 331) in which it is stated:

"The position has changed even in England since the passing of the *Law of Property Act*, 1925. The mortgagee no longer holds a legal estate in the mortgaged property. The mortgagor is the owner at law. On the whole, I am inclined to agree with the view taken by the majority of the Judges of the Full Bench of the Allahabad High Court which seems to be more in consonance with the conception of the rights



of a mortgagor and a mortgagee according to the Indian law. Therefore, in my opinion the right of a mortgagor in the property which he has given in usufructuary mortgage, is a legal right in a tangible immovable property."

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33. Yet in another case reported in *Tukaram v. Atmaram*, A.I.R. (26) 1939 Bom. 31 : (I.L.R. (1939) Bom. 71), Broom field, J., in delivering the judgment of the Division Bench, observed:

"Prior to this Full Bench Case *Sohan Lal v. Mohan Lal*, 50 All. 986 : (A.I.R. (15) 1928 All. 726 F.B.), the view taken by the Allahabad High Court and taken by the Madras High Court in *Ramaswami v. Chinnal Asari*, 24 Mad. 449, was that the equity of redemption to a simple mortgage is tangible because the mortgagor is in possession, but in a usufructuary mortgage, it is intangible because he is not in physical possession. Conversely, as to the mortgagee's interest, it is intangible if the mortgage is a simple mortgage, but tangible if the mortgage is a usufructuary mortgage. But "sale" is defined in Section 54 of the Transfer of Property Act, as a transfer of ownership and "mortgage" is defined by contrast in S. 58 as a transfer of an interest, and having regard to the definitions, the basis of the distinction sought to be made is not very obvious. There is no difficulty about the interest of a simple mortgagee. That is clearly intangible property; but the real reason is, I should say, not that the mortgagee is not in possession of tangible property but that he is not the owner. The interest which he owns is a right to recover his money out of the property. But can it be said that the usufructuary mortgagee is in any better position in this respect? It is true that he is in possession of tangible property, but he is not the owner of it and cannot transfer the ownership of it. What he owns and can transfer is an interest in the property entitling him to remain in possession and enjoy the profits until the debt is paid, and that is intangible. On the other hand, the mortgagor is the owner of the property itself, and can transfer the property itself subject to the mortgage, and whether the mortgage is with or without possession, if the mortgagor transfers his rights, that may well be regarded, in my opinion, as a sale of tangible property. The definition of rule says nothing about possession, and though the purchaser is normally entitled to get possession of the property sold at once, it is not always or necessarily so. No doubt it is correct to say, as Sulaiman Ag. C.J., says in *Sohan Lal v. Mohan Lal*, 50 All. 936 : (A.I.R. (15) 1928 All. 726 F.B.), that a tangible thing must be capable of being possessed, but to say that in the case of a Bale, it must be capable of being immediately possessed by the transferee seems to me to be adding something to the definition of sale for which there is no warrant. As at present advised, therefore, I am of opinion that the decision of the majority of the Court in *Sohan Lal v. Mohan Lal*, 50 All. 986 : (A.I.R. (15) 1928 All. 726 F.B.), is correct."

34. With all respect, I find myself in agreement with the view expressed by the Full Bench of the Allahabad High Court and relied upon by the Patna and the Bombay High Courts that the sale of the property by the mortgagor which he has given in an usufructuary mortgage, is a sale of tangible property, and not intangible property.

35. The next question is whether in this case, the sale not being registered, there was delivery of the property agreed to be sold within the meaning of Section 54 of the Transfer of Property Act. I have given considerable thought to the observations of the learned Judges of the Full Bench in the case reported in *Sohan Lal v. Mohan Lal*, 50

ALL. 986 : (A.I.R. (15) 1928 ALL. 726 F.B.), in which all the three Judges took the view that in an usufructuary mortgage, there can be no delivery of possession inasmuch as the mortgagee was in possession all along. The learned Judges, however, conceded that there can be a change in the character of the possession in pursuance of an unregistered sale. It is true that they considered the question of the change in the character of the possession in relation to the question of adverse possession, but it seems to me that if on the facts of a case, the change in the character of the possession can be fairly regarded as deli, very within the meaning of Section 64 of the Transfer of Property Act, there is no reason why effect should not be given to it. It appears to be settled law that delivery of possession within the meaning of Section 54 of the Transfer of Property Act, need not necessarily be made at the time of the sale; it can be made after wards. The Patna High Court in a case reported in *Pheku Mian v. Syed Ali*, 15 Pat. 772 : (A.I.R. (24) 1937 Pat. 178), had occasion to consider this aspect of the case. In the present case, the facts are much stronger than the facts of the Patna case. It is clear from the judgment of the lower appellate Court that the land agreed to be sold in this case did not consist only of the mortgaged land, but an additional piece of land measuring a bigha, which was not the subject-matter of the mortgage. The land in suit being agricultural property, the patta appertaining to the property was originally granted by the revenue authorities, to the mortgagor. In 1928, when the property was mortgaged the patta was still in the name of the mortgagor. But in 1934 when the mortgagor sold the mortgaged property and a bigha, which was not the subject-matter of the mortgage, proceedings for a perfect or imperfect partition were instituted before the revenue authorities, apparently at the instance of the mortgagee, and at this partition, the mortgagor was also present, and according to the Mandal of the locality (D.W. 2), the S.D.C., ordered partition and mutation of names after consulting both the mortgagor and the mortgagee. Upon this partition, the mortgaged property and the property which was not the subject-matter of the mortgage, were allotted to the mortgagee. This allotment upon partition at which the mortgagor was present, although made by the revenue authorities, must, in my opinion, be regarded as an act of delivery by the mortgagor to the mortgagee, within the meaning of Section 64 of the Transfer of Property Act, and real delivery within the meaning of the decision of the Privy Council reported in *Mathura Prasad v. Chandra Narayan*, 48 I.A. 127 : (A.I.R. (8) 1921 P.C. 8).

36. The learned Judges of the Allahabad High Court were not dealing with facts such as are present in this case. If in this case, a partition

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had not been made by the revenue authorities in the presence of the mortgagor and the mortgagee, or if the mortgagor had objected to the partition, I would have in all probability followed the decision of the Full Bench of the Allahabad High Court in its entirety. But having regard to the partition and allotment to which apparently the mortgagor assented, the assent of the mortgagor to partition and allotment amounts, in my opinion, to delivery of property by the mortgagor to the mortgagee within the meaning of Section 54 of the Transfer of Property Act. In this view, I would confirm the judgment and decree of the lower appellate Court and dismiss the appeal.

#### ORDER

THADANI, C.J.:— In this case, a difference of opinion having arisen between my learned brother and myself—my learned brother taking the view that the judgment and decree appealed from should be modified, and taking the view that it should be confirmed. The provisions of sub-s. (2) of Section 98 of the CPC, are attracted. The

result is that the judgment and decree of the lower appellate Court is confirmed.  
D.H.

37. *Decree Confirmed.*

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