

**(1926) 07 PAT CK 0002**  
**In the Patna High Court**  
**Case No : Appeal No. 523 of 1029**

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|--------------------------------------|------------|
| Karnal Nayan Prasad Sinha and others | APPELLANT  |
| Vs                                   |            |
| Ram Nayan Prasad Sinha and others    | RESPONDENT |

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**Date of Decision :** 30-07-1926

**Acts Referred:**

**Citation :** (1926) 07 PAT CK 0002

**Final Decision :** Allowed

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### **Judgement**

Das, J.—This appeal arises out of a suit instituted by the plaintiff-respondent to enforce a zarpeshgi executed by the defendants first party on 15th April 1907. The suit is based on the allegation that the plaintiff has been dispossessed of the mortgaged properties by the defendants. The Court below has found that there is no truth whatsoever in the story of dispossession, so that it must follow that the plaintiff is still in possession of the mortgaged properties.

2. The question which we have to consider is whether, having regard to the fact that the plaintiff is in possession of the mortgaged properties, he is entitled to bring a suit for realization of the money due to him by the sale of the mortgaged properties. The learned Judge in the Court below has taken the view that the mortgage in this case is an anomalous mortgage and that as there was a covenant in it to pay the mortgage money on a certain date, the plaintiff is entitled to bring a suit for the sale of the mortgaged properties. In so deciding the learned Judge has professed to follow the decision of this Court in Jag Sahu and Others Vs. Musammat Ram Sakhi Kuer and Others, . In the case to which the learned Judge refers, it was found that the usufructuary mortgagees had been dispossessed of the disputed land by the mortgagors and it was also found that there was a clear covenant to pay the mortgage money on a certain date. Now, in this case the learned Judge has found that the story as to dispossession is wholly false, but he has, no doubt, found that there is a covenant in the mortgage bond on the part of the mortgagor to re-pay the mortgage money on a certain date. We have construed the mortgage bond and it appears to us that it

is in common form. The only passage which might support the theory of the learned Judge in the Court below is as follows :

I shall take back this patta in the last month of Bhado 1321 Fasli after paying off the entire zerpeshgi money in one lump sum to the thikkadara and take back possession of the leasehold property.

3. But then follows an important passage which has been evidently overlooked by the learned Judge. That passage runs as follows:

In case the zerpeshgi money be not paid in due time by the executant in one lump sum then this patta will remain in force and intact till the re-payment of the zerpeshgi money with all conditions set forth therein.

4. In my opinion, the passage which was obviously in the mind of the learned Subordinate Judge does not contain a covenant to repay. An absolute covenant cannot) be coupled with a condition that if the money be not paid within the time fixed the mortgagee would continue to be in possession and the mortgage bond will remain in force. Identically the same question arose for decision in the Calcutta High Court in Luchmeshar Singh v. Dookh Mochan Jha [1897] 24 Cal. 677 and it was held in that case that a passage almost in the same words did not amount to a covenant to repay. In my judgment the decision of the lower appellate Court is wholly erroneous.

5. I would allow the appeal, set aside the judgment and the decree passed by the Court below and dismiss the plaintiff's suit with costs throughout.

Rowland, J.

6. I agree.