
(1956) 08 OHC CK 0002
In the Orissa High Court
Case No : Second Appeal No. 141 of 1952

Shyamsundar Panda and Another	Vs	APPELLANT
Sitaram Singh Samanta and Others		RESPONDENT

Date of Decision : 28-08-1956

Acts Referred:

Transfer of Property Act, 1882 — Section 58, 62

Citation : (1958) 24 CLT 52

Hon'ble Judges : Rao, J; Mohapatra, J

Bench : Division Bench

Advocate : D.V.N. Rao and A.K. Tripathy, for the Appellant; B.N. Das and N.V. Ramdas, for the Respondent

Final Decision : Allowed

Judgement

Rao. J.

1. The Defendants filed this Second Appeal against the reversing judgment of the learned Subordinate Judge, Berhampur decreeing the Plaintiff's suit for redemption of a mortgage dated 10.5-1925 and for delivery of possession of the mortgaged properties to the Plaintiffs on payment of certain amount of money.
2. The Plaintiffs' case is that their father borrowed money from Gadadhar Panda, the deceased father of the Defendants In 1917 and executed two usufructuary mortgage .bonds in his favour; that the debts under these two mort age bonds of 1917 amounted to Rs. 519/- in 1925 ; that Plaintiff No. 1 took Rs. 81/- In cash and executed the suit possessory mortgage bond for Rs. 600/- on 10-5-1925 in favour of the deceased father of the Defendants; and that since then the suit land remained in possession of the family of the Defendants and as the Defendants di not give up possession in spite of notices, this suit for redemption was filed.
3. The Defendants contended, denying their knowledge about the suit mortgage bond, that the possession of the suit lands was with them and with their

ancestors for more than 50 years before the suit; that the, suit land is an estate being a dharmilla inam and as such they had acquired occupancy right; that the Plaintiffs were not entitled to eject them from the suit lands; that the suit document did not amount to a mortgage bond and consequently the suit for redemption and possession was not maintainable.

4. The trial Court found that the suit document was not a mortgage bond and that the Defendants and their ancestors had acquired occupancy right in the suit lands. He also held that the suit lands were not service inam lands and that the Inam grant in favour of the Plaintiffs was only in respect of Malevaram right and was not In respect or Kuddivaram right of the land.

5. On appeal, the learned Subordinate Judge held that the suit bond was an anomalous mortgage bond; that the Defendants had no right of occupancy inasmuch as the suit lands were service inam lands; and that the Plaintiffs were entitled to redeem and recover possession of the mortgaged properties after paying the principal money of Rs. 600/- and Rs. 600/- more towards interest.

6. Mr. D.V.N. Rao, the learned Counsel for the Appellants raised two points before os in this appeal. He contended that the Appellants are occupancy tenants of the suit lands as the suit lands are dharmilla inam and that the document sued upon is not and cannot amount to a mortgage bond.

7. It is the common case that the suit land is subsequent Jagir inam granted to the Plaintiffs" father by the proprietor of the Surangi Estate. Ext. 1 which Is a certified copy of the suit mortgage bond as also Ext. 1 (a) a certified copy of the prior registered mortgage bond dated 12.7.1917 (the other mortgage bond of 1917 was not filed) describe the suit lands as dharmilla Jagir inam. As such the land is within the ambit of the Zamindary and if it is shown that the ancestors of the Defendants were in possession of the land before the passing of the Madras Estates Land Act, 1908 they would certainly have occupancy rights in case it is not shown as a subsisting service tenure. The learned Munsif discussed the entire evidence and arrived at the findings that the Defendants" ancestors were in cultivating possession of the land prior to 1908; that the Plaintiffs" father was accepting rent from them; that it was not a service inam and consequently held that the Defendants were occupancy tenants. The learned Subordinate Judge, however, came to the conclusion that the suit lands were service inam lands and that the Defendants could not acquire any occupancy right by virtue of Section 3, Clause (16) of the Madras Estates Land Act though he agreed with the learned Munsif on first two findings. Both the Courts having held that the Defendants were in cultivating possession of the lands, as tenants since prior to the passing of the Madras Estates Land Act, the only question which is to be considered is whether the suit lands are service inam lands so as to deny the Defendants" Occupancy right in the same.

8. To come to a conclusion that the suit lands are service Inam lands, the learned Subordinate Judge relied upon a statement in the evidence of P.W. 1 that the suit

lands are Bhalaloki service inam which Was not denied by the Defendants or their witnesses in the course of their evidence though it was not alleged in the plaint that it was Bhalaloki service inam. Bhalaloki inam is not a service tenure. Bhalaloki means a respectable person and therefore there can be no such service as a Bhalaloki service. S. Sundararaja Iyengar in his book on Madras Land Tenures at page 122 classifies Bhalalog grant as a grant in favour of particular persons and observes, "Bhalalog, lands granted revenue-free to suport the dignity of persons of rank admitted to the court of zamindars by virtue of their position." The learned Sub. Judge also relied on a statement of Defendant 1 in his evidence to the effect that the Zamindar resumed the suit in 1932 and that he could not remember if it is zerioti or inam and came to the conclusion that this statement supported the Plaintiffs' case that the suit land is service foam. He observed in his judgment- "There is no dispute that neither zerioty nor inam lands can be resumed unless the lands be service tenure lands". I cannot understand this statement. It is nothing but some confused and wrong notions of the words zerioti and resumption. Zerioti lands can never be subject-matter of resumption. The learned Subordinate Judge is also wrong in thinking that it is only service Inam lands that can be resumed. The learned Subordinate Judge was also influenced in arriving at his decision by Ext. 5 the inam register of the Surangi Estate. Ext. 5 shows according to the learned Sub ordinate Judge that the inam of the Plaintiffs is a service inam. We have examined Ext. 5. No doubt it appears to be a book maintained by the proprietor of the Surangi Estate, but opposite to the suit inam which is stated to be in the name of the Plaintiffs " father, it was not stated that it was a service inam but only a dot was put though against some other inam above it was written "service inam". Further in our opinion, this document cannot be relied upon, as it was only a self-serving statement made by the proprietor of the estate and the evidence of P.W. 2 who proved these entries cannot be accepted as at the time when these entries were made, P.W. 2 was not in the service of the estate. Ext. 2 is the certified, copy of the inam income account. This Inam account is submitted by the zamindar to the Collector under a statutory liability by virtue of the Madras Local Boards Act in order to enable the Collector to assess various cesses. The fourth column of this inam account contains the heading C the name of inam" and it is mentioned therein as "Swaproyajanam" which on translation may mean "for personal benefit". Ext. A is also a similar account statement of the year 1909. Therein, in column 4 It has been described as "Jagir". The - learned Subordinate Judge declined to rely upon these two documents holding-that these entries do not rule out the possibility that the suit inam was service inam and observed that service inam was certainly an inam for personal benefit. In- my opinion, this is not the way of trying to avoid the effect of the clear statement in Ext. 2 that the suit land is Swaproyajanam or for personal benefit. An inam shown as having been granted for personal benefit cannot be a service inam. The learned Subordinate Judge also came to the conclusion that Jagir in connection with a tenure invariably meant in North Orissa a service tenure. He did not consider in detail as to what the term "Jagir" meant as far as the Madras land tenures were

concerned. No doubt he referred to a judgment reported in Ramalinga Mudali and Another Vs. T.S. Ramasami Ayyar, and stated that their Lordships in that decision referred to Wilson's Glossary and Maclean's Glossary for the interpretation of the word "jagir", as also other decisions of the Madras High Court. But he explained away these observations by simply saying that the authorities do not hold that the Jagir cannot be interpreted as a service tenure and that rather they favour such an interpretation if other evidence in the suit showed the same. In Wilson's Glossary, "Jagir" is defined as follows:

A tenure common under the Mahomedan Government by which the public revenues of a given tract of land were made Over to a servant of the State together with the powers requisite to enable him to collect and appropriate such revenue and administer the general Government of the district. The assignment was either conditional or unconditional. In the former case some/public service as the levy and maintenance of troops or specified duty was engaged for. The latter is left entirely at the disposal of the grantee. The assignment Was either for a stated time or more usually for the lifetime of the holder lapsing on his death to the State although not unusually renewed to his heir on payment "of Nazaranna or fine and sometimes specified to be a hereditary assignment etc.

In Maclean's Glossary, Volume S, "Jagir" is defined thus:

A tenure common under the Mahomedan Government by which the revenues of a certain tract of land were made over to a servant of the State, either unconditionally or on the condition of performing some public service such as the levy and maintenance of troops or other specific duty. The assignment was either for a stated term, or more usually for the lifetime of the holder lapsing on his death to the State, although not unusually renewed to his heir on payment of a nazaranna or fine and sometimes specified to be a hereditary assignment. A jagir was liable to forfeiture on failure of performance of the conditions on which it was granted or on the holders incurring the displeasure of the Emperor. Jagirs Were treated by the Inam Commission as major inams.

In the case referred to by the learned Subordinate Judge reported in Ramalinga Mudali and Another Vs. T.S. Ramasami Ayyar, , the grant was made in 1763 by the Nawab of Carnatic to a lady of the family Khairun-Nissa Begum and this was termed as a Jagir. Apparently the grant to a lady of the family could not have been burdened with any service or granted in lieu of service. S. Sundararaja Iyengar in his book on Madras Land Tenure, 1916, at page 117 observes:

A jagir is a political grant and is rarely found in this Presidency... A jagir was either "conditional or unconditional. Conditional jagirs were those granted to meet the expenses of some office, public or private, or some specified duty and were held so long as the office or duty subsisted. Unconditional jagirs were those granted independently of any office for the maintenance and dignity of the holder, and a suitable number of attenders and efficient troops which the mansabdars were bound to have in readiness... A jagir is prima facie a personal

grant for the life of the donee, though it might be made in the terms ... hereditary. It is sometimes difficult to draw the line of distinction between a jagir and inam when the former had been made or suffered to become hereditary... But where the object and terms of the grant showed that the Intention was to make a permanent provision for the family of the grantee, the Privy Council in the case of *Gzelabdas Jagjivandas v. The Collector of Surat* 6 I.A. 54 (P.C.), held, that each holder took the jagir only for life, and that any alienation beyond his life was invalid.

Generally, in Madras, grants made to members of the family, for their maintenance are termed Jagirs. Consequently, the user of the word "Jagir" in the In am account does not necessarily connote that it is a service tenure. On the other hand, the definition given of a Jagir in the Wilson's Glossary as well as Maclean's Glossary as also the extracts quoted from S. Iyengar's book on Madras Land Tenure clearly indicate that it is also an unconditional grant of land revenue to the members of a family. The term "Jagir", therefore, does not necessarily connote that It Is a service grant. On the other hand, it definitely connotes that it is a grant of land revenue only. Thus, in my opinion, the use of the expression "Jagir inam" with reference to this land not only shows that it is a personal grant but also that it is a grant of the Malewaram right only.

9. The learned Subordinate Judge also failed to consider that unless it is shown that the service tenure subsists, a grant cannot be excluded from being an estate. Section 3, clause (16) of the Madras Estates Land Act reads as follows.

Ryoti land means cultivable land in an estate other than private land but does not include

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(c) lands granted on service tenure either free of rent or on favourable rates of rent if granted before the passing of this Act or free of rent is granted after that date, so long as the service tenure subsists.

In order to deny occupancy rights to the Defendants on the ground that the lands come under this clause, it is incumbent upon the Plaintiffs to prove that the service tenure subsists but there is absolutely no evidence in this case that the service tenure subsists. The Plaintiffs made up attempt to state what is the nature of service rendered by the grantee or by themselves and they do not even state that they were performing any service at the present time.

10. Ext. A relating to Fasli 1318 corresponding to the year 1909, a certified copy of the inam account shows that Gadadhar Panda was the principal ryot in respect of the lands which were recorded as Jagir inam In the name of Sitaram Singh Samanta. The receipts filed by the Defendants from the year 1899 clearly show that they were paying rent to the grantee who was giving receipts to them. The learned Munsif very carefully discussed the entire evidence on this matter and came to the conclusion that the Defendant's ancestors were cultivating tenants

on the land even prior to the passing of the Madras Estates Land Act and the proprietor was receiving rent from them and passing receipts. It has been already shown that the learned Subordinate Judge erred in treating this as a service inam. For these reasons. I am of opinion that the Defendants have occupancy rights in the suit lands, the grant being a dharmilla inam.

11. The learned Counsel for the Plaintiffs-Respondents contends that the Defendants are estopped from setting up a claim of occupancy right in the suit lands by virtue of the mortgage bonds taken by them from the Plaintiffs' father Shyamsundar Singh Samanta. The Plaintiffs' contention is that the Defendants' father, according to the terms of the mortgage, undertook to deliver Khas possession of the lands at the end of the period stipulated in the mortgage and the mortgage proceeds on the footing that he had no occupancy right therein and the Plaintiffs' predecessor-in-title was entitled to get possession of the land at the end of the term. According to the Plaintiffs' contention, the mortgage is a mortgage of Kuddivaram right of the inamdar and the Defendants' father having taken the mortgage under those terms he cannot set up occupancy right in the land. But this contention of the Plaintiffs can be rejected on the simple ground that there can be no estoppel as Section 187 of the Madras Estates Land Act is to this effect.

(1) Nothing in any contract between a land-holder and a ryot made before or after the passing of this Act

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(g) shall entitle a land-holder to eject a ryot otherwise than in accordance with the provisions of this Act.

The learned Counsel for the Respondents contends that this provision does not apply to the case of a mortgage but only to cases where a landlord wants to eject the tenant from possession of the lands. But in the case of Boddana Ramudu and Others Vs. Sasapu Sanyasi Naidu and Another, ., it was held:

The policy of the Legislature as enacted in Section 187 is to protect the tenant against himself and prevent him from entering into any contract by which he can deprive himself of the protection afforded by the statute. Except by voluntary surrender u/s 143 of the Estates Land Act, or by adopting the procedure prescribed in Section 151 a tenant cannot be deprived of possession of land wherein he has occupancy right. Consequently, where in a mortgage of dharmilla land in favour of the tenant by the landlord the tenant in ignorance of his rights agrees to deliver possession after the expiry of the term of mortgage the tenant is not estopped from denying the landlord's right to claim possession of land.

12. Therefore, we are definitely of the opinion that the suit land is a dharmilla inam and is not a service tenure and the Defendants are entitled to occupancy rights and therefore cannot be ejected from the same and the Plaintiffs are not entitled to recover possession of this land.

13. The second contention raised by the learned Counsel for the Appellants relates to whether Ext. 1, the suit mortgage bond purporting to be a usufructuary mortgage bond amounts to a usufructuary mortgage or even can amount to a mortgage at all; Both the Courts below came to a definite conclusion that Ext. 1 is not a usufructuary mortgage bond as the terms do not satisfy the requirements of Section 58, Clause (d) of the Transfer of Property Act defining a usufructuary mortgage. Both the Courts were also of the opinion that the terms of the mortgage bond do not make out a simple mortgage. The trial Court held that the suit document does not amount to a mortgage at all. But the lower appellate Court came to the conclusion that it is an anomalous mortgage. If the suit document does not amount to a mortgage at all, then it is clear, as contended by the learned Counsel for the Appellants, that the suit for redemption does not lie, and the Plaintiffs will not be entitled to recover possession of the properties.

14. The terms of the mortgage bond as translated by the lower Court into English are as follows:

Usufructuary mortgage bond of Sri Sitaram Singh Samanta to Gadadhar Panda dated 10-5-1925.

This usufructuary mortgage bond is executed for Rs. 600/- on the 10th May 1925 by... in favour of... to the following effect.

The lands described in paragraph three below are hereby mortgaged to you with possession, for a sum of Rupees six hundred, which is made up of a cash sum of Rs. 519-0-0 being the amount due to you, after settlement of accounts on the two registered bonds bearing No. 2694 dated 13-7-1947 and No. 1061 dated 11-4-1917 of the office of the Sub Registrar, Ichapur, and a further sum of Rs. 81-0-0 taken from you previously on different occasions. The interest payable on this amount is at the rate of annas eight per month per hundred. You will execute complete repairs to the afore said lands, cultivate the same and grow crops on them. The landlords share due to me, of the crops raised thereon, that is to say of the paddy, shall be made over to me before the Full Moon day of the month of Magh every year, either after it is appraised by five respectable persons or according to your estimation, or in accordance with the practice prevailing in the Village; the share of the dry crop viz, green-gram and gingelly, shall also be made over to me at the time of their harvest, Receipts for the payments 150 made shall be obtained by you and credits; for the payments not supported by such receipts will not be allowed. The payments in the shape of paddy made will be endorsed on the back of the bond, and credit for any payments not so endorsed, shall be inadmissible. Within a time limit of five years from today, I will discharge the dues relating to the principal and interest of this bond in full, get the payment in full satisfaction endorsed on the back of the bond and take it back from you and also take possession back of my lands. In the event of my default to pay of the mortgage dues in full, within this stipulated time, the mortgaged properties "shall remain in your possession only, until they are

discharged in full, in accordance with the aforesaid terms.

15. The relevant provisions of Section 58 of the Transfer of Property Act are as follows:

(a) A mortgage is 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.

(b) 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 of sale to be applied, so far as may be necessary, in payment of the mortgage-money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee.

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(d) Where the mortgagor delivers possession or expressly or by implication binds himself to deliver possession of the mortgaged property to the mortgagee, and authorizes him to retain such possession until payment of the mortgage-money, and to receive the rents and profits accruing from the property or any part of such rents and profits and to appropriate the same in lieu of interest, or In payment of the mortgage-money, or partly in lieu of interest or partly In payment of the mortgage-money, the transaction is called an usufructuary mortgage and the mortgagee an usufructuary mortgagee.

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(g) A mortgage which is not a simple mortgage, a mortgage by conditional sale, an usufructuary mortgage, an English mortgage or a mortgage by deposit of title-deeds within the meaning of this section is called an anomalous mortgage.

16. It is clear that though in Ext. 1 the mortgagor expressly delivers possession, there is no provision, which is obligatory, that the mortgagee is entitled to receive the rents and profits accruing from the property or any part of such rents and profits and to appropriate the same towards his debt. Consequently, Ext. 1 cannot be a usufructuary mortgage and both the courts below held accordingly. It cannot also be a simple mortgage as In this case according to Ext. 1, the possession of the property was delivered to the mortgagee and there is no right of sale in default of payment. The question remains whether it is an anomalous mortgage. The learned Subordinate Judge seems to have come to the conclusion that it is an anomalous mortgage, simply because it does not come either under Clause (b) or Clause (d) of Section 58 of the Transfer of Property Act. No doubt, he said that the learned Munsif was wrong in saying that Ext. 1 did not amount to a mortgage by simply considering that there was no transfer of an interest in the immovable property according to the terms of Ext. 1.

17. The contention of the learned Counsel for the Appellants is that inasmuch as the Defendants are occupancy tenants of the land and inasmuch as there is an express term in the mortgage bond that the landlord's share due to the mortgagor of all the crops raised on the land according to the estimation shall be paid to the mortgagor, there is no transfer of the Malevaram right which is the only right in the mortgagor. No doubt, on my finding that the Defendants were on the land even before the passing of the Madras Estates Land Act and acquired occupancy rights in the same, the contention is apparently plausible. But the document clearly envisages a transfer of an interest in the land as according to the recitals of the document, the mortgagee became a lessee from that day.

18. But the main question to be considered is whether the requirement of Section 58 (a) is not satisfied, inasmuch as the terms of the mortgage bond do not in any way show that the transfer was made for the purpose of securing payment of money advanced or to be advanced by way of loan. The contention of Mr. D.V.N. Rao is that under the terms of the mortgage Ext. 1 the entire Rajabhagam is payable to the mortgagor and what is left to the mortgagee is the tenant's share, that is practically the expenses of cultivation. Consequently, there is absolutely nothing to enable the mortgagee to secure the payment of money advanced inasmuch as according to the terms there is no further clause empowering him to foreclose or to sell the properties in case of default of payment of the mortgage money by the mortgagor. Mr. B.N. Das, on the other hand, contends that Ext. 1 is a mortgage inasmuch as there is a fixation of the period of redemption as there is the express term to the effect-within a time limit of five years from today I will discharge the dues relating to the principal and interest of this bond in full...." and "in the event of my default to payoff the mortgage dues in full within this stipulated time, the mortgage properties shall remain in your possession only, until they are discharged in full." As there is an undertaking to pay the amount advanced and as the mortgagee is entitled to remain in possession till the payment of the said amount with interest, Mr. Das contends that the requirements of Section 58, Clause (a) of the Transfer of Property Act are satisfied.

19. Both the Courts have held that Ext. 1, though it purports to be an usufructuary mortgage, is not an usufructuary mortgage. It cannot be a simple mortgage as under Clause (b) of Section 58 of the Transfer of Property Act, it is absolutely necessary to be such that there should be an agreement expressly or impliedly that in the event of the mortgagor failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied so far as may be necessary, in payment of the mortgage-money. Ext. 1 does not provide for a right of sale in default of payment of the mortgage-money as agreed upon. The learned Subordinate Judge held that it is an anomalous mortgage. But, in my view, it cannot amount to an anomalous mortgage, as the terms in the mortgage bond do not enable the mortgagee to secure payment of the loan advanced. He is simply to remain in possession paying the entire Rajabhagam to the mortgagor

till the mortgage-money is paid, without getting anything towards his debt and without having a right to sell or foreclose. This, in my opinion, does not amount to securing payment of the money advanced. In an anomalous mortgage, the rights of the parties are to be determined by its terms and there is no term in the deed to secure payment of the debt either by enjoying the whole or part of the usufruct or to sell the property or foreclose the mortgage. To be an anomalous mortgage, it must first amount to a mortgage as required by Clause (a) of Section 58 of the Transfer of Property Act.

20. Stroud's Judicial Dictionary, Volume 4, 3rd Edition, defines "Security" at page 2697 as follows:

A "security", speaking generally, is anything that makes the money more assured in its payment or more readily recoverable, as distinguished from, . e. g., a mere I. O. U. which is only evidence of a debt.

According to this definition it is the assurance in its payment or ready recovery ability that constitutes a particular thing a security for a debt. The terms of the mortgage bond Ext. 1, do not, in my opinion, satisfy this definition

21. In the case of Nidha Sah and Anr. v. Murli Dhar and Ors. 30 Ind App 54, it was held that the Plaintiffs, who had granted the land in suit to the Defendants for a fixed term free of rent in consideration of past and present advances made to them, were entitled to eject the Defendants at the expiration of the term notwithstanding that other lands had been included in the grant of which the Plaintiffs failed to give possession, and in consequence the Defendants had been unable to recoup themselves s the money advanced. Their Lordships observed in their judgment:

This instrument, though it is called a mortgage, and though it will be convenient to follow the "nomenclature used in the document itself and in the pleadings and judgments in the Courts below, is not a mortgage in any proper sense of the word. It is not a security for the payment of any money or for the performance of any engagement. No accounts were to be rendered or required. There was no provision for redemption expressed or implied. It was simply a grant of land for a fixed term free of rent in consideration of a sum made out of past and present advances.

The suit was based on the proprietary right of the mortgagor claiming ejectment. Though it was contended before their Lordships that the mortgagor, having broken his part of the contract by failing to give the mortgagee possession of the entirety of the premises comprised in the mortgage, ought not to be allowed to enforce the contract as against the mortgagee, their Lordships held that the answer to that contention appeared to their Lordships that the Plaintiffs were not seeking to enforce the contract and they relied on their proprietary right and the Defendants having failed to show any stipulation which deprived the Plaintiffs of their right to recover possession, the Plaintiffs were entitled to eject the Defendants. It may be noted that in this case though the Defendants were

realising the profits of the land and though the document purported to be a mortgage bond, it was held by their Lordships that the transaction evidenced by the document was not a mortgage. In the case of Kammara Peda Subbyya and Anr. v. Kararha Chennappa and Ors. 28 M.L.J. 303, a Division Bench of the Madras High Court held that where the holder of an un-enfranchised blacksmith's service inam gave a lease for 45 years in 1884 with a provision that the rent was to go in reduction of a debt due under a bond of even date but contrary to the terms of the lease trespassed upon the land in 1911, in a suit filed by the "mortgagee against his sons he could not secure possession. Sadasiva Aiyar, J. in the course of his judgment observed:

I am not satisfied that the two documents A and B constituted an usufructuary mortgage as contended for by the Appellants.... I hold that as a definite sum is stated as rent due periodically to the father of Defendants 1 and 2 as the Plaintiffs could under no circumstances be entitled to bring the properties to sale for recovery of the money advanced, the documents are instruments creating a lease and creating an ordinary simple money debt.

In that case Ext. A was a deed of annual lease in which it was stated that this lease had been given for 45 years fixing the annual lease amount at the rate of Rs. 8.10-0 per annum and entitled the grantee to set off this amount at the rate of Rs. 8.10-0 towards the discharge of the deed amount and that he should enjoy happily for 45 years and should relinquish possession of the lands in the 46th year. The other document Ext. B which was executed on the same day recited referring to the prior document- "The amount standing due up to date is Rupees 388-2.0, in words, three hundred and eighty eight rupees and two annas should be paid by me to you. Therefore for the discharge of this amount, I have this day executed in your favour that you should from this year enjoy at the rate of Rs. 8-10.0 per annum the lands.... Therefore until the said debt amount is discharged, you should on the 30th day of Palghunababulam every year from this "year set off towards this deed the said lease amount of Rs. 8.10.0, eight rupees and ten annas. If any impediment is caused in any year in the matter of your enjoying the said lands in that manner, I shall pay to you the interest for the total amount standing due up to that year at the rate of rupee 1-0-0 per cent per mensem from the date of the execution of this deed, and the principal, on demand and take back my deed", Though these two documents taken together entitled the mortgagee to be in possession and to appropriate the rent towards the debt due, the learned Judges held that the transaction did not amount to a mortgage as the Plaintiffs could under no circumstances be entitled to bring the properties to sale for recovery of the money advanced. In the instant case before us, there is absolutely nothing to enable to mortgagee to appropriate any portion of the rent towards the debt, and there is no provision enabling the mortgagee to sell the properties in default of payment. In the case of a reference from the Board of Revenue reported in ILR Mad 203, a Full Bench of the Madras High Court held that a document purporting to be a deed of mortgage with possession, by which the executant finding himself in an account settled indebted

to another person to the extent of Rs. 899-12-0 and possession was made over to him of certain lands for nine years in liquidation of the principal and interest, giving him permission to enjoy the produce of the lands and stipulating for a payment to the executant of only a sum of Rs. 35/- annually, although the parties might have understood and described the transaction as a mortgage, it was in fact a sale of the term or lease for nine years with a reserved rent of Rs. 35/-, in consideration of Rs. 899-12-0, the amount of the debt and interest, and did not accept the view of the Board that it came u/s 62, Clause (a) of the Transfer of Property Act. The document was held to be a lease with a premium. In the case of *Kongatti Valia Nayar v. Subramanian Pattar* 9 M.L.J. 290, the Defendant was put in possession of the property by the Plaintiff under all instrument which provided that the Defendant should manage the property for a space of 18 years and pay himself from the income thereof any advances that he might make to the Plaintiff or on his behalf but that the Defendant's heirs should have no manner of right to the property and that at the end of the contract the Defendant should account (or the moneys that had come into his hands. It was held:

The document was neither a lease nor a mortgage but an authority coupled with an interest.

In the case of *Kawal Patti and Another Vs. Ram Jokhan Upadhya*, a debtor took a loan of Rs. 500/- from his creditor on the foot of a pronote and subsequently put the creditor into possession of his "khudkasht" fields under an oral agreement between the parties to the effect that the creditor should continue in possession till the debt is liquidated. It was held that:

The transaction did not amount to a "mortgage" within the meaning of that term under the Transfer of Property Act, and the person in possession will not be a "mortgagee".

In the case of *Dalip Singh and Ors. v. Bahadur Ram* ILR 34 All. 446, a suit was filed for sale on the basis of a deed. In the document it was recited that the executant had borrowed a sum of money followed by a promise to pay the amount with interest at 2 per cent per month within a certain time and then provided that the mortgagee's possession will remain in force till the payment of principal and interest due on the mortgage bond and on the date of execution of the deed the land was mortgaged. It was; held by a Division Bench of the Allahabad High Court:

In order that there may be a simple mortgage, there must be (a) a transfer of an interest in specific immovable property, (b) a personal undertaking by the mortgagor to pay the mortgage money, and (c) an agreement, express or implied, that in the event of the mortgagor failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold. The second requirement is satisfied. There is no express transfer of an interest in property, and there is no express agreement that in case of default

the mortgagee may bring the property to sale.... In our opinion the deed is not a mortgage.

22. In support of his contention that Ext. 1 is a mortgage, Mr. B.N. Das, the learned Counsel for the Respondents relied upon the following decisions. In the case of *Basant Lal and Anr. v. Tapesri Rai* ILR 3 All. 1, by an instrument in writing called a "sattah" in consideration of a loan of Rs. 99-8-0 the executant agreed that the transferee should have the right of cultivating indigo on a certain land from a certain date for a certain period; that if she failed to make over to him any portion of such land, or interfered with his cultivation of my portion of it, she should be responsible in damages for the loss occasioned in respect of such default or interference at the rate of Rs. 40/. per bigha, and for the repayment of such loan. It was held in this case that the transaction was a mortgage and as it was for a sum of Rs. 99-8-0, it did not require registration. In this case clearly there is a clause securing to the mortgagee the repayment of the loan, as possession of the land was transferred to the mortgagee who was entitled to cultivate indigo and appropriate the income towards the debt. In the case of *Chhathi Lal Sah Kalwar Vs. Bindeshwai Prasad Sahu and Others*, , it was held that:

The suit was maintainable for the bond could not be usufructuary mortgage bond and there was an implied contract to mortgage debt on expiry of the specified term.

The facts of the case were as follows. A mortgage bond which purported to be a zarpeshgi deed stipulated that the mortgagee shall retain possession of the mortgaged property till the term of the zarpeshgi which was specifically fixed to be for three years. There was no provision in the bond that after the expiry of the term of three years the mortgagee would be entitled to retain possession of the mortgaged property until the repayment of money. The mortgagee after the expiry of the term brought a suit for recovery of mortgage money. It was contended that the mortgage was usufructuary and as such the mortgagee was not entitled to maintain the suit. The suit being only one for recovery of mortgage money without enforcement of the security, it is clearly maintainable and is of no use as far as the facts of the case before us are concerned. In the case of *Rameshwar Narain Singh Vs. Pani Ram Modi and Others*, , it was held that:

Where a person goes into possession of property for the purpose of securing the payment of his debts "owing to him and the language of the document creates a charge and gives a power of a conditional sale, the transaction amounts to a usufructuary mortgage and not a lease or a charge.

In my opinion, this case also does not help Mr. B.N. Das. The case of *Sheikh Dildar Hussain and Others Vs. Sheikh Saddip and Others*, , is a case which lays down a distinction between a mortgage and a lease. There was a term in the document in that case that the said lessees should enter into possession and

occupation of the lease-hold properties, cultivate and cause proper cultivation to be made etc. Out of Rs. 4000/-, the fixed jama, the details regarding the period, jama and extent of share of which were given, the said lessees would deduct each year on their own authority Rs. 1,575/-. The document also showed that the sum borrowed Was Rs. 10,000/-. Here there is an express term that, the lessee or mortgagee should deduct Rs. 1,575/- every year towards the repayment of his debt and consequently the learned Judges held that it amounted to a mortgage. The next case relied upon by the learned Counsel for the Respondents is a Division Bench decision of the Madras High Court in the case of Immani Seshayya and Others Vs. Dronamraju Lakshminarasimha Rao Pantulu (dead) and Others, . In this case, a sum of Rs. 2,200/- was advanced to the borrower, who agreed to pay an equal sum as Interest thereon. The lender was put in possession of certain lands belonging to the borrower and as between the parties, the annual profits were estimated at Rs. 240/-. The lender was required annually to pay Rs. 100/- for the revenue and village expenses, appropriate Rs. 80/- towards the mortgage debt and pay the balance of Rs. 60/- to the debtor. It was further provided that after the debt was discharged in 55 years in the manner set forth, the creditor was to surrender possession of the land to the borrower, and that If the lender failed to pay Rs. 60/-, he should be bound to relinquish a part of the land in proportion to that sum. Since 1882 the annual payment of Rs. 60/- was never made to the mortgagor. On these facts, it was held that:

The parties intended that the money was to be repaid and that the land Was to be treated as security for repayment.

Here there is an express term that the mortgagee should appropriate Rs. 80/- towards the mortgage debt and consequently this decision does not help the contention raised by the Respondents. In the case of Samandan Karakat Etathil Karnavan Ryrappan Nambiar v. Manikot Velluva Veetil Raman Nambiar and Ors. 33 M.L.J. 679, it was held:

A document executed in Malabar and styled a "panayam" under which the borrower agrees to pay within one year the principal sum secured by the document with interest creates a simple mortgage and is not a mere deed of charge.

In the course of his judgment, Sadasiva Aiyar, J. observed:

As regards the first point, namely, the question of limitation, the document is a "panayam" deed and the word "panayam" when used in documents executed in Malabar means a mortgage if the property governed by the "panayam" deed is immovable property. Further the provision in Exhibit A that "the sum of Rs. 400/- with interest will be paid to the mortgagee within one year" clearly implies a personal covenant by the mortgagors to pay the amount and when there is "such a personal covenant it has been held by a long course of decisions the document of this character is a document of simple mortgage under the Transfer of

Property Act.

This decision, in my opinion, has no bearing on the facts before us as the decision turned upon the use of "panayam" to denote the transaction. The case of Rama Brahmam and Ors. v. Venkatanarasu Puntulu and Ors. 23 M.L.J. 131 is also a case of a simple mortgage where it was held that:

Formal transfer of interest and an express power of sale are not essential elements of a mortgage. A covenant to pay is an essential element of "a simple" mortgage.

In this case the document is expressly stated to be a simple mortgage and there is a covenant to pay." Naturally in law there is a right of sale as a legal incident to a simple mortgage and therefore there is security for repayment of the loan advanced. In the present case before us, the document is not styled a simple mortgage, but on the other hand purports to be a usufructuary mortgage. The case of Pargan Pandey and Ors. v. Mahatam Mahto 6 Cal.L.J. 143, is a case of usufructuary mortgage bond where there was a hypothecation of the land a covenant to repay the sum advanced, as also an agreement under which the mortgagees were entitled to take possession of the land and to enjoy the profits of the land in lieu of interest. It was held:

It was not a pure usufructuary mortgage and the mortgagees were entitled to sue for their money.

This case does not in any way help the contention of the Respondents before us. The last case cited by the learned Counsel for the Respondents is a decision of their Lordships of the Judicial Committee of the Privy Council in the case of AIR 1937 124 (Privy Council) . In that case, it was held by their Lordships that:

The essence of a transaction by way of loan on security, is that the lender, unwilling to rely solely on the personal liability of the borrower, requires in addition to be given a right in rem; and to insert in the same document a provision by which the borrower bestows the required right in rem, and a provision enabling the borrower to destroy it forthwith, is a proceeding difficult to contemplate as probable.

The Appellant before their Lordships was one Nathu Mal, the mortgagee who filed the suit for enforcement at his security. A sum of Rs. 13,500/- was borrowed from the Appellant and the repayment thereof was secured by the deed of the 15th May, 1919. The security was for a fixed term of two years and carried interest at a rate equivalent to 7 1/2- per cent per annum. After the two years had expired the rate rose to the equivalent of 9 per cent per annum. The security was expressed to be subject to Raman Mal's mortgage of the 26th February 1906, over the two shops at Lahore. The mortgagors sold a part of the mortgage security which was also subject to a prior mortgage to the prior mortgagee. The contention of the Respondents in that case was that upon the true construction of Nathu Mal's mortgage deed, there was conferred upon the mortgagors or

upon Ram Das a power which enabled them or him at any time to sell and transfer any part of the mortgaged property freed from the mortgage security, without either knowledge or consent on the part of the owner of the security. It was in repelling this contention that their Lordships of the Judicial Committee observed as quoted above. Clearly the expression "right In rem" Is used by their Lordships to denote the right of sale inserted in a simple mortgage which is the subject-matter of the transfer. Mr. Das cannot rely upon this expression in the said observation and contend that because possession was transferred to the mortgagee, there is a transfer of a "right in rem" and therefore the suit document amounts to a mortgage.

23. On a consideration of the above authorities in the decisions quoted above and the definition of "security" given in Stroud's Judicial Dictionary, I am of opinion that the terms of Ext. 1 do not satisfy the requirements as required by Section 58, Clause (a) of the Transfer of Property Act. The transaction, in my view, does not amount to a transfer of an interest of an immovable property for securing repayment for the loan advanced.

24. To summarise, my conclusions are:

- (1) that the land mortgaged is a dharmilla inam ;
- (2) that it is not a service tenure ;
- (3) that the Plaintiffs failed to prove that the service tenure, if any, is a subsisting service tenure;
- (4) that the Defendants were the tenants of the land from even the time of the passing of the Madras Estates Land Act, 1908, under the Plaintiffs' father;
- (5) that consequently the Defendants at the time of the suit mortgage were occupancy tenants of the land;
- (6) that the suit mortgage bond is not a usufructuary mortgage bond or even a simple mortgage bond or an anomalous mortgage bond; and
- (7) that it does not even amount to a mortgage as required u/s 58 (a) of the Transfer of Property Act, inasmuch as it does not secure repayment of the mortgage money.

25. In my opinion, both the contentions of the Appellant are well founded. The suit being a suit for redemption and for recovery of possession of the suit land and my findings being that the suit document is not a mortgage bond and the suit land is an estate, I am of opinion that the judgment of the tower appellate Court is wrong. The appeal is, therefore, allowed, the decree and judgment of the learned Subordinate Judge are set aside and the suit is dismissed. In the circumstances of the case there will be no order as to costs. The Plaintiffs shall withdraw the amount of Rs. 1,200/- deposited by them into Court.

Mohapatra, J.

26. I agree.