PRIVY COUNCIL

(Chelikani) Venkatarayanim Garu

Vs.

Venkata Subadrayamma Jagapathi Bahadur Garu

P.C. Appeal No. 21 of 1921
(Lords Buckmaster, Phillimore, CJ Sir John Edge, J. Sir Lawrence Jenkins and Lord Salvesen JJ.)

30.11.1922

JUDGMENT

Lord Buckmaster J.

1. Three questions are raised upon this appeal. They all arise out of the rights created under a mortgage deed which was executed on the 2nd March, 1891, in favor of the first plaintiff in the suit by he first defendant. The appellants are assignees of the equity of redemption of that mortgage, and claim that in the accounts takes do determine the true amount due under the deed, three mistakes have been made adverse to their interests. The mortgage deed itself is in a peculiar form. It is a mortgage with possession to secure the repayment of Rs. 1,80,000 with interest at the rate of Rs. 1 per cent. per month; the principal of the debt is to be repaid by sums of Rs. 10,000 payable year after year, begin ning on the 1st February, 1892, down to the 1st February, 1898, and on the 1st February 1899 the entire balance of the debt and the interest is to be paid. These installments are protected not merely by the security of the mortgaged property but also by an express agreement in these terms : We shall pay to you at Tuni, the principal according to the aforesaid installments and the whole of the interest upon the entire debt calculated with reference to the installments along with the last installment." There was a further agreement in the deed by which certain charges which would be incurred by the mortgagee, when in possession, were fixed at the sum of Rs. 4,000 per annum. They are specified as being the usual earth work repairs annually done to canals, etc; expenses on account of the village headmen, service Inams of village headmen, village deities contingent charges and other business expenses. The deed also contained two further material provisions. The first that notwithstanding the arrangements by which the mortgagee was to be put into

possession a lease was to be granted by him to the mortgagor for a period of two years, and the second that if the provisions of the mortgage deed as to re-delivery of the estate to the mortgagee by the mortgagor at the expiration of the lease for two years were not carried out, the mortgaged estate should at the end of the time stand sold to the mortgagee for the entire amount due inclusive of the balance of principal and interest, and further that the mortgagor should not sell any portion of the estate to anybody except the mortgagee. Arrangements were also made by which the mortgagee was to pay all the necessary peishoush or quit rent or land cess, and a provision that if that should be raised there should be a further right on his part to recover the money from the mortgagor with interest as therein mentioned. What happened consequent upon the execration of the deed was this : The lease for two years was duty granted to the mort gagor, but at the expiration of the term he did not pay the second installment due on February 1, 1893, nor did he redeliver pos session to the mortgagee. The mortgages accordingly instituted a suit for recovery of possession and for the amount of too second installment. To meet this a sum of Rs. 15,000 was paid into Court by the appellants on behalf of the mortgagor, but possession was not delivered up by him and he was in fact in possession at the time when the third installment became due.

2. Shortly before this date, namely on 16th January, 1894, the mortgagor executed a sale dead for Rs. 1,60,000 for same of the mortgaged properties, and a mortgage for Rs. 60 000 for the others in favor of the appellants, and requested them to pay to the mortgagee Rs. 2,05,000, being the total Rs. 2,20,000 after deducting the Rs. 15,000 already paid into Court. The appellants accordingly, on the 10th February 1894 tendered the Rs. 10,000, due on the 1st February to the mortgagee, who refused to accept the money upon the ground that there exited at that date a breach of the bargain made by the mortgagor as to re delivery of possession, and that consequently his acceptance might prejudice his rights. Their Lordships think that this is a mistaken view of the rights which the mortgagee possessed. The agreement for the payment of the installments of the purchase-money is in fact the main obligation of the mortgage deed, and the whole of the other provisions, however extensive and far reaching they may be, are really nothing but tea security to enforce this obligation. The acceptance of Rs. 10,000 due on the 1st February, 1894, would not have prejudiced the mortgagee in any way in the claim he had then pending against she mortgagor for possession, and their Lordships think there was consequently no justification for his refusal of the tender. The fact that the tender was nine days after the due date is of course immaterial; accordingly, in taking the accounts, interest on the sum of Rs. 10,000 according to the terms of she dead must cease to be charged against the mortgagor

from the 10th Feb ruary, 1894.

3. On the 13th July, 1894, the mortgagee obtained a decree for possession, and entered in pursuance of its terms, so that the agreement for the annual allowance of Rs. 4,000 for the particular payments to which reference has been made became operative, and the next question is as to the validity of that agreement. It is urged on behalf of the appellants that it gives the mortgagee a collateral advantage under the deed which he is not entitled to exact, but their Lordships think that that contention cannot be supported. The truth is that it is a fixed payment to be made in respect of a variable charge, and though it may be assumed that the amount was not fixed so as to prejudice the mortgagee, there is nothing to prevent the mortgagor and mortgagee entering into a bargain as to what sum should be charged annually for expenses that may or may not exceed the agreed figure. They therefore think the objection to the Rs. 4,000 cannot be maintained.

4. There remains what is after all the most serious part of this appeal, and it is the claim that in February, 1899, the appellants were willing and offered to make a tender of the whole of the outstanding principal and interest, but that the mortgagee so acted as to excuse the actual ten der being made, and that in consequence there is no longer any right on the part of the mortgagee to debit interest in the mortgage accounts from that date. This controversy depends upon the true meaning to be placed on two important letters. The first is written on the 17th January, 1899, by the appellants to the mortgagee. It refers to the mortgage and the assignments, and points out that the balance of the monies payable by them to the mortgagor in respect of such transaction - which appear to be stated erroneously at Rs. 2,25,000 instead of Rs. 2,05,000 - had not been paid over but left with them for satis faction of the mortgage debt, and concludes in this way. "It is requested that, on receipt of this letter, the amount becoming due to you by that date from the estate may be made known at once. Soon after receipt of your letter, we are ready to send respectable man with money and gat the repayment of the amount of your debt made in full in the forenoon on the due date. Your reply is requested." Both the Subordinate Judge and the High Court Judges, before whom this case has been heard, have come to the conclusion that that was not a *bona fide* offer on the part of the appellants. They say that they had not at that time either the money or the control of the money that would have enabled them to meet the tender of the large amount that was due upon the mortgage deed. Their Lordships think, for reasons that will presently appear, that it is not necessary to consider that question. It is very difficult indeed to say whether or no a man will be able to have

control of money at a future date, and the real question to be determined here is not whether that money was within the power of the appellants but whether the mortgagee in the letter he sent in answer to the offer definitely and unequivocally refused to accept the money, were it tendered. Be fore reading this reply it is well to hear in mind what has been stated by Vice-Chancellor Wigram in the case of Hunter v. Daniel 4 Hare's 420, as to the true position in such a case. He there says : "The practice of the Courts is not to require a party to make a formal tender where from the facts stated in the Bill or from the evidence, it appears the tender would have been a mere form and that the party to whom it was made would have refused to accept the money." Their Lordships think that that is a true and accurate expression of the law, and the question, therefore, is whether the answer that was sent on behalf of the mortgagee amounted to a clear refusal to accept the money. The letter is dated the 28th February, 1899, and is in part in the form of an argument, and the substantial part is as set out in the record in these words :- "As in the face of the suit instituted by us of late in the District Court of Vizagapatam against the proprietor for possession of the entire proprietary estate of Uratla held by as under the terms of our possessory mortgage deed, you have purchased from the proprietor, as you have stated, daring the pendency of that suit and subsequent thereto, with full knowledge of the conditions, and c, of our possessory mortgage deed, and yet in contravention of the same and without necessity, a considerable portion of the estate at different times for, Rs. 2,40,000 in favour of yourself and others, there is no need for us to pay any of those amounts you state under that head, in as much as the right to purchase that estate for that sale price has vested in us."

5. The explanation of the earlier part of that paragraph is due to the provisions contained in the dead which prohibit, so far as they had the power, just such a transaction as that which had taken place. The latter part of the letter is unfortunately an obvious mistake or misprint. Either it should run, "there is no need for us to receive," or "there is no need for you to pay us any of those amounts you state under that head." The better reading in favour of the appellants is the latter, "there is no need for you to pay any of those amounts you state under that head inasmuch as the right to purchase that estate for the sale price is vested in us." Accepting this as the true reading, the meaning of the letter in their Lordships' mind is this, that the rights which the mortgagee had conferred upon him have vested in him the whole of the estate and that consequently the mortgage is at an end. It was an erroneous view based upon invalid provisions in the deed, but it by no means followed from that that if in fact the tender had been made of the whole of the principal money and interest which was due

up to that date, the mortgagee would not have accepted it, and it is re markable that in the latter part of the latter he continues in these words :

> "In reply to the letter, dated 14th ultimo, from the Proprietor about the balance of demand after payments made, on the Pro prietary Estate of Kola Uratla, we informed him on the 27th instant, that the amount of debt due under our said deed was Rs. 3,19,946-2-2."

6. Now upon the view that this letter was intended to excuse the mortgagor from making any tender at all under the deed, there could have been no possible reason for stating what the amount was that was to be paid. The fact is that this letter contains a reason why the tender is unnecessary, but the reason was wrong because the right to buy according to the terms which the mortgage deed contained was a right which was not enforceable in law. But it is on that hypothesis that they say there is no need for payment to be made. If this were not accepted as correct, there is no thing to relieve the appellants from making the tender. Their Lordships are unable to construe the latter as equivalent to any such clear release to the mortgagor of his obligation to tender the money as is required in order to justify him in not having presented it for receipt. From that time to this nothing has in fact been ten dered. No money has been paid into Court, and no effort on the part of the mortgagor has been made to satisfy his obligations under the deed. Their Lordships, therefore, think than the appellant must fall upon that part of his appeal. It follows, therefore, that the appeal succeeds, but succeeds only to a very limited extent, but though it is small in relation to the part in respect of which be fails; be does obtain some substantial relief which could not have been obtained without coming before this Board, and their Lordships therefore think, having considered all the circum stances, that be ought to have one-half of the taxed costs of the appeal, and they will humbly advise His Majesty accordingly.

Appeal allowed in part.