

## PRIVY COUNCIL

Bachchu Lal

Vs.

Mohammad Mah

P.C.A No. 43 of 1931

(Lord Thankerton, J. Sir John Wallis and Sir Lancelot Sanderson. JJ)

12.01.1933

### JUDGMENT

#### **SIR LANCELOT SANDERSON J.**

1. These are two consolidated cross-appeals against a decree of the Chief Court of Oudh dated 20th December 1929, which varied a decree of the Subordinate Judge of Unao dated 4th February 1929. Defendants 1 to 3 are the appellants in the first appeal, and the plaintiffs and defendant 4 are the respondents. In the second appeal the plaintiffs are the appellants and defendants 1 to 3 and defendant 4 are the respondents. Defendant 4 has not appeared before the Board.

2. The appeals arise out of a suit for redemption of a mortgage. The mortgage deed was dated 21st September 1901, and was executed by *Chaudhri Syed Mohammad Mah and his brother Chaudhri Syed Talib Ali* in respect of their ten-annas share of the property specified in the deed. The former is one of the plaintiffs in the suit and the latter has since the date of the mortgage died. The other two minor plaintiffs are his representatives-in-interest. The plaintiffs are hereinafter described as the mortgagors. The mortgagee was one Mt. Babuain Ram Dei. She also has died, but in her life-time she transferred the mortgaged property by way of a trust under a deed of settlement dated 28th May 1910, in favor of *Pandit Bachchu Lal alias Ram Shankar*, defendant 1, and *Babu Lachhmi Narain and one master Shambhu Nath*. *Shambhu Nath* has since died, and *Babu Lachhmi Narain* has relinquished the office of a trustee. Pandit Ram Kishore, Babu Sheo Prasad, defendants 2 and 3 respectively, together with Pandit Bachchu Lal, defendant 1, now represent the trust estate and are hereinafter described as the mortgagees. Madho Shankar, defendant 4, is mortgagee 2.

3. The mortgagees entered into possession of the mortgaged property in accordance

with the terms of the mortgage. The principal sum of money in consideration of which the mortgage was executed was Rs. 75,000, "bearing interest at the rate of six annas per cent per month repayable in 17 years."The material clauses of the mortgage deed are as follows:

"1. That before the execution hereof, we have placed the mortgagee in proprietary possession and occupation of the mortgaged haqiat ; and the mortgagee shall enjoy all powers, i. e., cultivation arrangement, collection (paper torn) from every tenant, mal sewai and other items, the alteration and ejection of tenants, ejection on account of arrears of rent, enhancement of rent, suits for arrears of rent due from tenants, like myself. We shall get the mutation (paper torn) in respect of the mortgaged haqiat effected in favour of the mortgagee through the revenue Court according to law should there be any negligence in the matter of mutation of names on our part, the mortgagee has the power to herself file an application and get mutation effected in her own favour, to which we, our heirs and representatives and successors shall have no objection. 2. That after collecting the gross rental, amounting to Rs. 9,058- 8- 11, under the jamabandi for 1306 Fasli, in respect of the mortgaged share, as shown to the said mortgagee, and deducting Government revenue, village expenses and Rs. 600 per annum, the pay of servants, etc., settled and agreed upon between us and the said mortgagee the mortgagee shall appropriate the surplus profits towards interest, we, the mortgagors, having no claim for profits, and the mortgagee for interest. 5. That after the expiry of the period provided herein, we having paid the aforesaid mortgage money to the said mortgagee, we shall get the mortgaged property redeemed in the fallow season of the month of Jeth and if we be unable to do so, this mortgage deed having been deemed as sale-deed and this very mortgage money as the sale consideration, the mortgaged haqiat shall stand foreclosed and the mortgagee shall become the absolute proprietor. 7. That if any land appertaining to the mortgaged share is duly acquired for Government purposes and any decrease in the profits payable to the mortgagee, accrues for that reason or if the mortgagee has to pay any other kind of new Government cess with regard to the mortgaged property and the same cannot be realised from the tenants in spite of all legal efforts, then we shall continue to pay this deficit in the annual profits out of our own pocket in cash or from our other moveable or immovable property, we shall be entitled to get the compensation for the land paid by the Government in cash; 8. that at the time of redemption of the mortgaged haqiat we shall have no objection in

paying off any arrears due from each tenant, within legal limitation, which could not, in spite of legal efforts, be realised by the mortgagee during her possession as such, the same being paid along with the principal mortgage money ; 9. that the mortgagee shall have no objection against receiving any money, whole or part, within the period stipulated hereunder, which we might pay; and we shall be entitled to a deduction in interest at 6 annas per cent per month, in respect thereof. In case of the payment of the entire amount, the mortgaged property shall stand redeemed in the fallow season of the month of Jeth, the mortgagee having no objection thereto."

4. On 9th May 1927 Madho Shankar, the second mortgagee, deposited the sum of Rs. 75,000 under section 83, Transfer of Property Act, 1882, to the account of the mortgagees in the Court of the Subordinate Judge of Unao, within whose jurisdiction the mortgaged property lies. On 2nd June 1927 the mortgagors tendered a further sum of Rs. 200. On 4th June 1927 the sums so deposited and tendered were refused by the mortgagees on the ground that they were insufficient and on the ground that the deposit was conditional. The petition of Madho Shankar, which referred to the deposit of the Rs. 75,000, contained the following paragraphs:

"Para 4. - That in the course of mortgage the prior mortgagees have done much damage to the mortgaged property, they have wasted and ruined the mortgaged property, have executed perpetual leases in respect of several plots of land, and having excavated brick-kilns on considerable land have rendered it utterly waste and useless. Likewise the mortgagees have committed such other acts which have greatly diminished the value of the mortgaged property and have caused much loss to the mortgagors. Therefore the mortgagors are entitled to recover compensation for the damage, for which a suit will be brought by them hereafter. Since the mortgagors are going to get the mortgaged property redeemed very soon and do not consider it proper to delay in this matter, and therefore the applicant is ready to pay over to the prior mortgagees the whole amount of Rs. 75,000 (seventy-five thousand rupees) without deduction of any compensation money payable to the mortgagors.

"Para. 5. - Wherefore the applicant submitting this application under section 83, Act 4 of 1882, prays that permission be granted to him to deposit in the Court the sum of Rs. 75,000 (seventy-five thousand rupees) the opposite parties be served with notice that they should take over the entire aforesaid amount ; and having redeemed the mortgaged share of zamindari, file in Court the original mortgage deed in favour of the aforesaid Babuain Ramdei. As the fallow season

is going to be over in a short time and it is expedient to effect the service of the summons under this application before the close of the fallow season hence an order be passed to hand over the summons to the applicant in person."

5. It was by reason of the claim for damages and the notice of a suit in respect thereof contained in para. 4 that the mortgagees contended that the deposit was conditional and therefore ineffective. The mortgagors instituted their suit on 4th November 1927, and prayed for redemption of the mortgage upon payment of Rs. 29,058-13-10 only, claiming deductions which amounted to about Rs. 45,941. During the hearing of the case in the trial Court the amount which the mortgagors admitted they were liable to pay was increased to Rs. 29,177-9-10. The mortgagees claimed certain sums in addition to the sum of Rs. 75,000, which need not be set out in detail at present. The learned Judge after considering the claims for deductions made by the mortgagors and the counterclaims of the mortgagees decided that the mortgagors were entitled to redeem the mortgaged property on payment of Rs. 75,782-11-3 and costs to the mortgagees and made a decree to that effect. The decree provided that if the payment was not made on or before 4th August 1929 the mortgagees might apply for the sale of the mortgaged property.

6. Against that decree the mortgagors appealed to the Chief Court of Oudh, and the learned Judges of that Court held that the above mentioned deposit and tender were sufficient and that the mortgagees were liable to account for the gross receipts in respect of the mortgaged property from the date of the said deposit and tender. They accordingly set aside the decree of the Subordinate Judge and remanded the case to him with a direction that he should make a preliminary decree for redemption under Order 34, Rule 7, Civil Procedure Code, according to the directions given in their judgment. They further ordered that the costs of the suit in the Court of the Subordinate Judge and half the costs of the appeal should be credited to the mortgagors in the accounts.

7. Against the decree of the Chief Court, the mortgagees have appealed to His Majesty in Council and the mortgagors have filed a cross-appeal. The learned counsel for the appellant-mortgagees confined his argument in respect of the accounts to three matters. In addition to these he relied upon the point that the deposit of the Rs. 75,000 was conditional. Item 1 in the accounts which needs consideration relates to the damages payable by the mortgagees for waste.

8. The Subordinate Judge allowed a sum of Rs. 3,162-14-5 to the mortgagors in respect of this matter out of a total claim for Rs. 6,471-1-6 made by them. The learned

Judges of the Chief Court agreed with the Subordinate Judge's decision as regards this claim in respect of such items as he had taken into consideration, but they came to the conclusion that the Subordinate Judge had omitted to make any allowance in respect of an area of three bighas nineteen biswas which they considered had been permanently injured by the erection of brick kilns thereon.

9. Consequently they held that the mortgagees were liable to be debited with some amount, which would have to be ascertained by a Commissioner, in addition to the sum of Rs. 3,162-14-5. It was contended in this appeal on behalf of the mortgagees that in fact the Subordinate Judge had taken into consideration all the land which had been proved to be permanently injured. Their Lordships need not refer to this matter in detail, inasmuch as the learned counsel appearing for the mortgagors in this appeal did not dispute the mortgagees' contention in this respect. The result is that the decision of the Subordinate Judge that the mortgagors are entitled to Rs. 3,162-14-5 in respect of waste must stand. The second point relates to a claim by the mortgagees in respect of loss alleged to have been suffered by them by reason of certain portions of the mortgaged property having been acquired by the Government. The Subordinate Judge decided that the mortgagees were entitled to the sum of Rs. 1,712-9-2 in this respect. The learned Judges of the Chief Court disallowed this sum.

10. They referred to the terms of the above-mentioned Clause 7 of the mortgage deed, and held (a) that the mortgagees had not proved any loss, and (b) that, inasmuch as the undertaking of the mortgagors in Clause 7 was that if there was any decrease in the profits the mortgagors would pay the amount of the deficit out of their own pocket in cash or from other moveable or immovable property, the mortgagees were not entitled to bring the amount of the loss into the accounts in the redemption suit. There is no dispute that the portions of land, mentioned by the Subordinate Judge, were in fact acquired for railway, canal, and other Government purposes, and that the mortgagors received the compensation money paid in respect thereof. As regards (a), their Lordships are of opinion that there was material before the Subordinate Judge which would entitle him to arrive at the conclusion that there had been a decrease in the profits by reason of such acquisitions and no ground has been brought to their notice to show that his calculation as to the amount of such loss was wrong. As regards (b), their Lordships are of opinion that this matter may properly be brought into the accounts in the suit. The undertaking by the mortgagors in Clause 7 undoubtedly amounts to a personal covenant by them to pay the amount of the decrease of the profits, but the arrangement as regards the event of the acquisition by the Government

was one of the terms on which the mortgage was granted, and the fact that the mortgagors entered in to a personal covenant to pay the amount due from them in respect of the acquisition by Government does not prevent the said amount being taken into consideration in settling the total sums which should be paid by the mortgagors when redeeming the property covered by the mortgage.

11. Their Lordships therefore agree with the decision of the Subordinate Judge that the mortgagees are entitled to credit for the sum of Rs. 1,712-9-2. If this sum be deducted from the sum of Rupees 3,162-14-5, to which the mortgagors are entitled, there is left the remainder of Rs. 1,450-5-3, to the credit of the mortgagors. The third point which was argued by the learned counsel on behalf of the mortgagees was in respect of a sum of Rs. 2,233-0-6 which the mortgagees claimed for alleged arrears of rent, under the above-mentioned Clause 8 of the mortgage deed. The Subordinate Judge allowed this claim, and set it off against the sum of Rs. 1,450-5-3 for which he had credited the mortgagors; the difference between the sums of Rs. 2,233-0-6 and Rs. 1,450-5-3 is Rs. 782-11-1. The Subordinate Judge therefore came to the conclusion that there was a balance in favour of the mortgagees of at least Rs. 782 in addition to the Rs. 75,000, the principal sum secured by the mortgage, and that as the second mortgagee and the mortgagors had deposited and tendered Rs. 75,200 only, that sum was not sufficient.

12. On this last mentioned point the learned Judges of the Chief Court were of opinion that the alleged arrears had not been proved, and further that it had not been proved that "legal efforts" had been taken to realise the alleged arrears. The learned Judges did not say what in their opinion was the meaning of the words "legal efforts," but some of the expressions in their judgment indicate that they understood them to mean "legal proceedings." It is true that the only evidence as to the arrears of rent was that of Ram Narain, as the learned Judges stated in their judgment. The years, which were material for the purpose of considering what should have been included in the deposit and tender, were the Fasli years 1332, 1333 and 1334. Ram Narain's statement showed arrears of rent for these years amounting to more than the sum of Rs. 2,233-0-6, which was claimed by the mortgagees ; it is also true that the mortgagees did not call evidence to prove the account filed with their written statement which showed the total amount of arrears of rent due from the tenants therein mentioned to be Rs. 2,233-0-6.

13. On the other hand it is to be noted that Ram Narain was the Patwari of Unao, that he was a witness called by the mortgagors, that he gave the answers as to the arrears of rent in cross-examination, and that no questions were put to him on re-examination as to the correctness of his evidence in this respect except that it was elicited from him

that he had arrived at the rates of rent by an estimate. It is clear that further and more detailed evidence might have been given by the mortgagees and it is possible that they would have produced it at the trial but for the fact that they had elicited the above-mentioned evidence from one of the mortgagors' witnesses. In these circumstances their Lordships are unable to hold that the Subordinate Judge was not entitled to act on the evidence which the mortgagors themselves had provided. They therefore are of opinion that the finding of the Subordinate Judge as to the existence and amount of the arrears of rent must be accepted. There remains the question whether it was shown that the arrears could not be realised "in spite of legal efforts." The phrase "legal efforts" is vague. In their Lordships' opinion it is not equivalent to "legal proceedings in a Court of justice." Having regard to the connexion in which the phrase is used their Lordships are of opinion that it indicates the usual and lawful efforts to collect rents. The evidence relating to this matter is that the mortgagees had peons and collectors of rent; that the annual gross rental in respect of the mortgaged share was Rs. 9,058-8-11; the amounts of arrears for the three above mentioned material years were respectively Rs. 724-13-4, Rs. 258-5-0, and Rs. 1,790-11-7. These figures indicate that the arrears were a comparatively small proportion of the total rents in respect of the mortgaged share and confirm the evidence of Ram Narain as to the peons and collectors who were employed for the collection of rent, and point to a well-managed zamindari estate. Their Lordships are of opinion that the Subordinate Judge was entitled to take these matters into consideration and that there was material before him which justified him in holding that the arrears of rent were not realised 'in spite of legal efforts.'

14. The result therefore is that in their Lordships' opinion the decision of the Subordinate Judge in respect of the accounts was correct and that there was due from the mortgagors the sum of Rs. 75,782-11-3. The deposit and tender therefore were not sufficient. Having regard to the above-mentioned conclusion, it is not necessary for their Lordships to express any opinion upon the question whether the deposit was conditional and if it was conditional whether it would be ineffective and not in accordance with the provisions of Section 83 Transfer of Property Act, 1882. It was stated by the learned Judges of the Chief Court that there was a clerical error in respect of item 2 in list B, and that the Subordinate Judge had allowed a sum of Rupees 108-2-9 only to the mortgagors instead of Rs. 200-10-9. Their Lordships' attention was not drawn to the details of this item; and they do not deal with it. If there is a clerical error it should be corrected in the Court of the Subordinate Judge. The difference between the two amounts does not affect the result of this appeal. The learned Judges of the Chief Court drew attention to Clause 5 of the mortgage deed and

pointed out that the direction of the Subordinate Judge that if the payment of the sum mentioned in the decree was not paid within the time specified therein, the mortgagees might apply for sale of the mortgaged property, was not the appropriate remedy; but that foreclosure was the proper remedy. This question has not been argued before their Lordships and they express no opinion thereon. If and when the mortgagees apply for sale of the property in accordance with the decree of the Subordinate Judge the question can then be decided.

15. In the cross-appeal the mortgagors claimed credit for the sum of Rs. 2,000 which they alleged they had paid to Mt. Ram Dei, the mortgagee, towards the mortgage money; both the Courts in India found that the mortgagors had failed to prove the alleged payment and the learned counsel for the mortgagors in this appeal did not contest the correctness of the finding of the two Courts in this respect. The other point which was raised on behalf of the mortgagors in the cross-appeal was that upon the true construction of the terms of the mortgage deed the mortgagees were bound to account for the rents and profits of the mortgaged premises. Both the Courts in India decided this point against the mortgagors. But the question is one of construction of the deed, and it is necessary for their Lordships to express their opinion thereon. They do not think it necessary to go through the clauses of the deed in detail, because it was not seriously argued that the Courts in India were wrong in the construction which they put upon the deed. One of the most material clauses in the deed is Clause 2, and it was agreed that the last sentence in that clause must be read as follows :

"the mortgagee shall appropriate the surplus profits towards interest, we the mortgagors having no claim for profits and the mortgagee 'having no claim' for interest."

16. The provision for the rate of interest, viz., six annas per cent per month, was no doubt necessary in order to provide for the contingency, referred to in Clause 9 of the deed, viz., the possibility of the mortgagors paying the whole or part of the mortgage money within the stipulated period and for the deduction of the interest to which the mortgagors would be entitled. On the consideration of all the terms of the deed their Lordships have no doubt that the decision of the two Courts in India in respect of the construction of the deed was correct and that the mortgage deed was a contract within the meaning of Section 77 Transfer of Property Act, 1882. The cross-appeal, therefore in their Lordships, opinion fails. The result is that the appeal of defendants 1 to 3 should be allowed, the decree of the Chief Court dated 20th December 1929 should be set aside, and the decree of the Subordinate Judge dated 4th February 1929 restored.

17. The cross-appeal of the plaintiffs should be dismissed. The plaintiffs must pay the costs of defendants 1 to 3 in the Chief Court and of the appeal and cross-appeal to His Majesty in Council, and their Lordships will humbly advise His Majesty accordingly.

Order accordingly.