

BOMBAY HIGH COURT

Abraham Ezra Issac Mansoor

Vs

Abdul Latif Usman

(Leonard Stone, Kt., C.J. Kania, J.)

09.11.1943

JUDGMENT

Leonard Stone, Kt., C.J.

1. By reason of the transactions mentioned by Mr. Justice Chagla in his judgment dated July 15, 1943, the defendant, who is the appellant in this Court, is the mortgagee of certain property of the plaintiff for securing a principal sum of Rs. 35,000. His power of sale having arisen, the appellant purported to exercise it by entering into a contract for sale of the property to one Abdul Mahomed Allibhoy. In the Court below it was assumed that the power of sale was rightly exercised, and that the only issue to be dealt with-and which we have to deal with in this Court-is whether after the appellant as mortgagee had exercised his power of sale, by entering into a contract : the mortgagor still has a right to redeem. If he has such a right to redeem before the conveyance is executed ; then the respondent has exercised it : since pursuant to the order of Mr. Justice Blagden made on May 25, 1943, he brought into Court a sum of Rs. 47,500, which was the term imposed by the learned Judge for granting the interim injunction restraining the appellant from proceeding with the sale. Before turning to the relevant sections of the Transfer of Property Act, 1882, it is necessary to observe that the law of India does not recognise equitable estates in immoveable properties ; so that a contract for sale confers no equitable interest in the property on the purchaser. The relevant sections are Sections 60 and 69. Section 60 deals with the right to redeem and provides that at any time after the principal money has become due the mortgagor has a right, on payment or tender, as therein mentioned, of the mortgage money, to require the mortgagee to retransfer his interest : provided that the right conferred by the section had not been extinguished inter alia by the act of the parties. Section 69 confers on the mortgagee the power of sale on default of payment by the mortgagor without the intervention of the Court in the cases therein mentioned, and under Sub-section (c), it is provided that where a power of sale without the intervention of the Court is expressly conferred on the mortgagee by the mortgage deed and the mortgaged property or any part thereof was on the date of the execution of the mortgage deed situated in.... There follows a list of towns : one of them being this city.

2. The question raised in this appeal is as to the joint effect of these two sections and can be put as follows : viz. Whether the case comes; within the proviso, i.e. whether the right to redeem has been extinguished by the act of the parties. We have been referred to the case of *Waring (Lord) v. London and Manchester Assurance Co.*¹ the late Mr. Justice Crossman says this : Counsel for the plaintiff, who has argued the case most excellently, submitted that, notwithstanding that the company exercised its power of sale by entering into the contract, the plaintiff's equity of redemption has not been extinguished, as there has been no completion by conveyance, and that, pending completion, the plaintiff is still entitled to redeem, that is, to have the property reconveyed to him on payment of principal, interest, and costs. Counsel is relying, to some extent, on the provisions of the Law of Property Act, 1925, which creates a statutory power of sale. In my judgment, Section 101 of that Act, which gives to a mortgagee power to sell the mortgaged property, is perfectly clear, and means that the mortgagee has power to sell out and out, by private contract or by auction, and subsequently to complete by conveyance ; In my judgment in India an unregistered contract of sale is not a sale " out and out." Section 54 of the Transfer of Property Act defines sale as a transfer of ownership in exchange for a price paid, and such transfer, in the case of tangible immovable property of the value of one hundred rupees and upwards, can be made only by a registered instrument. The English case is no doubt a useful guide ; but it is not decisive of the issue. In England a purchaser from a mortgagee gets an equitable interest in the property and therefore it becomes a question of competing equities, and the Court will not assist the mortgagor by granting him a remedy unless there is corruption or collusion on the part of the mortgagee. In India the case is quite different. In the first place, as I have already stated, there is no equity or right in the property created in favour of the proposed purchaser by the mere contract between the mortgagee and the proposed purchaser and therefore the whole position is regulated by statute. The material words in Section 60 being : " has not been extinguished by the act of the parties ". No doubt that includes a combination of acts. Such acts in this case would be (1) the creation by the parties of the power of sale in the deed of mortgage, (2) the default of the mortgagor in making payment and (3) the contract of sale executed by the mortgagee. Taken together can it be said that these acts have extinguished the equitable right of redemption. I cannot see how the equity of redemption can be extinguished unless some other equity or right is set up or accelerated. The scheme of the Transfer of Property Act is supplemented by the Indian Registration Act, 1908. I have already referred to the definition of " sale" in Section 54 of the Transfer of Property Act. Section 17 of the Indian Registration Act provides that the " following documents shall be registered, if the property to which they relate is situate in a district in which, and if they have been executed on or after the date on which " the various Acts therein stated came into force. Sub-section (b) is as follows : other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or

contingent, of the value of one hundred rupees and upwards, to or in immoveable property ;In this case the contract for sale which is admitted to be in respect of property of the value of more than a hundred rupees, has not been registered, and it cannot in my judgment extinguish the equity of redemption. No case has been found in the books in which any purchaser from a mortgagee in this country has ever attempted to institute an action of specific performance. Specific performance is dealt with in Section 12 of the Specific Relief Act, 1877. The section gives the Court a wide discretion to grant or withhold specific performance. In my judgment, in the case of a contract by a mortgagee with an intending purchaser which does not extinguish the right to redeem the Court will not exercise its discretion in favour of a purchaser by granting him specific performance : but different considerations apply in cases in which the sale has been made by registered instrument. The learned Judge in Court below has put it in this way (p. 161 ante) ;...I think it is clear that till the sale was made by a registered instrument as required by the Transfer of Property Act the plaintiff continued to remain the mortgagor and the defendant continued to remain the mortgagee; and if that relationship subsisted between the parties, under Section 60 of the Transfer of Property Act the mortgagor had the right to redeem) on his tendering the requisite amount.I agree with that statement of the learned Judge. In my opinion the appeal must be dismissed with costs.

Kania, J.

3. The only point which was argued before the trial Court and here is, whether the right to redeem, given to the mortgagor under Section 60 of the Transfer of Property Act, came to an end when a mortgagee, having a power to sell on default of the mortgagor, as provided in the mortgage deed, enters into a contract to sell the property in the purported exercise of that power. The argument on behalf of the appellant is that without a conveyance being executed the right of redemption would come to an end. A conveyance only carries out the contract, and therefore when a contract is made the parties are bound by it, and the fact that the conveyance has not been executed is immaterial. It was contended that in entering into a contract for sale, when the power to sell was given to the mortgagee in the mortgage deed, the mortgagee acted as the agent of the mortgagor. In support of this contention it was pointed out that on sale the interest of both the mortgagor and the mortgagee passed to the purchaser and therefore the contract of sale must be also to sell the interest of the mortgagor and the mortgagee. The mortgagee alone having entered into such a contract the power must be considered as constituting the mortgagee an agent of the mortgagor to sell. It was argued that, if so, the agent having exercised the authority, it was not open to the principal to resile from the position and the contract of sale must be carried out.

4. In my opinion while conceding that what is sold by the conveyance is what is contracted to be sold, it does not mean that in exercising the power of sale the mortgagee acts as the agent of the mortgagor. The mortgagee exercises his right under a totally superior claim, which is not under

the mortgagor but against him. Indeed in most cases the sale is against the mortgagor's wishes. If the position of agency were accepted, a difficult question may arise if the mortgagor countermanded the authority of the mortgagee to sell before the contract of sale was made. No authority is cited to support the contention that in entering into the contract of sale the mortgagee acts as the agent of the mortgagor and in my opinion the position is not correct.

5. The question therefore is that when there is a contract of sale entered into by a mortgagee in the purported exercise of the power whether the equity of redemption is extinguished, as mentioned in Section 60 of the Transfer of Property Act. Now, the equity of redemption can be extinguished by the act of the parties or by a decree of the Court. There is no question of a decree of the Court in this matter, and therefore the appellant must rely on the words " by the act of the parties " to support his contention. In the present case the only act relied upon is the contract of sale. I am unable to consider that act as the act of the ' parties'. It is an act of the mortgagee alone. Secondly that act, i.e. entering into the contract of sale by itself, does not extinguish the right of redemption. A contract of sale, as defined by Section 54 of the Transfer of Property Act, does not create any interest in the property in the purchaser. It is only a personal contract between the person contracting to sell and the person contracting to buy. This distinction is material to be borne in mind in considering *Waring (Lord) v. London and Manchester Assurance Co.* [1935] Ch. 310, which was strongly relied upon by the appellant. In that case the Court considered the arguments advanced in this case on behalf of the respondent, viz. about the right to redeem continuing till the sale was completed and the mortgagor's right to redeem not being extinguished on a contract of sale only. These arguments were negatived in that case on the fundamental difference between English and Indian law, viz. that in England on a contract of sale the equitable estate passed to the purchaser and on execution of the conveyance only the legal estate passed. That view of the conveyance is not permitted in India, because according to the definition of sale in Section 54 on a contract of sale no interest in the property passes. It is only on execution of the conveyance that the ownership passes from one, party to another. The previous documents do not transfer any interest in the property. It may also be noted that if the extinguishment of the right to redeem is by a document, the same will require registration under Section 17 of the Indian Registration Act. I do not know how, without a transfer of the mortgagor's interest by a written registered instrument or by operation of law or by adverse possession, the right could be extinguished. The analogy of English law is therefore inapplicable.

6. It was next contended that Section 60 should be read as supplemented by Section 69. I do not think there is any objection to reading the two sections together. I do not however see any justification for adding in the proviso to Section 60 the following words : " and if the property is not contracted to be sold by the mortgagee in the purported exercise of the power of sale ". If the Legislature intended to do so, that could have been done. Indeed reading Section 69(3) I think it

is perfectly clear that it is only on a sale, (as contrasted with the purported exercise of the power of sale) that the title of the purchaser becomes complete and the sole right of the aggrieved party is thereafter in damages only. Till that stage is reached the Legislature has, in my opinion, deliberately refrained from providing that the mortgagor's right to redeem came to an end. The conclusion of the learned trial Judge on the construction of Section 60 and s. 69, that the right to redeem does not come to an end on the mortgagee purporting to exercise his power of sale, and that that right comes to an end only when the conveyance is executed, in my opinion, is correct. The appeal therefore fails and is dismissed.

Cases Referred.

1[1935] Ch. 310, At p. 317

