Privy Council Appeal No. 154 *of* 1924.

Dewan Bahadur Panaganti Ramarayanimgar . . . . . *Appellant*

v.

Sri Rajah Velugoti Govinda Krishna Yachendra Bahadur Varu, Maharaja of Venkatagiri, and others . . . . . *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT MADRAS.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 30TH NOVEMBER, 1926.

Present at the Hearing :

LORD PHILLIMORE.
LORD SINHA.
MR. AMEER ALI.
LORD SALVESEN.

[*Delivered by* LORD SINHA.]

This is an appeal against a decree of the High Court of Madras, dated the 19th of April, 1920, varying a decree of the Subordinate Judge of North Arcot, dated the 31st March, 1917, made in a suit filed in that Court on the 21st December, 1915.

That suit arose out of a transaction between the Raja of Kalahasti and the Raja of Tuni, which was embodied in Exhibit A and Exhibit I in the case.

Ex. A purports to be a deed of " mortgage with possession " of immovable properties described in Schedules A, B, C and D (hereafter called the A, B, C and D properties) for a sum of 11 lakhs of rupees, with interest at 10 annas per cent. per month, to be recovered from the rents and profits. The mortgagor was to have liberty to pay off the mortgage money at the end of four years, with option to defer payment for a further period of two years. If the money was not paid on the 13th of March, 1915, the entire amount then due was to carry interest at 1 per cent. per mensem—10 annas from the rents and profits and the remaining

6 annas to be payable by the mortgagor personally being also charged upon the properties.

Ex. I purports to be a muchilka or counterpart lease, by which the mortgagor Raja takes a lease from the mortgagee of the "A" properties for a period of four years, from the 1st July, 1909, to the 30th of June, 1913. The lessee was to pay a fixed yearly rent of Rs. 18,750, in three equal instalments, which is equivalent to interest on $2\frac{1}{2}$ lakhs at 10 annas per cent. per month. In default of payment of the rent reserved, the amount was to be recovered from the income of the ijara villages, and by means of the lessee's other property "*besides*" the property which was mortgaged with possession.

There was considerable controversy as to the precise meaning of the Telugu word "Gaka" in Ex. I, translated above as "*besides.*" It may mean "in addition to" or "excepting." Their Lordships feel no doubt that in the context that word means "*in addition to.*"

The circumstances under which the transaction embodied in Exhibits A and I took place were as follows :—

The Raja of Kalahasti was heavily in debt at the time. Decrees for sale had been obtained by mortgagees against the "A," "B" and "C" properties. The "B" and "C" properties had been actually sold, though proceedings to set aside the sales of the "B" properties were pending. To pay off all these encumbrances and to meet the expenses in connection with the proceedings to set aside the sales which had already taken place and other immediate necessities, it was necessary for the Raja of Kalahasti (the mortgagor) to raise a sum of 11 lakhs of rupees. That money was to be applied as follows :-

(*a*) $2\frac{1}{2}$ lakhs for payment of three mortgage decrees against the "A" properties and expenses in connection therewith.

(*b*) $2\frac{1}{2}$ lakhs to satisfy the mortgage decree against the "B" properties, and to meet all expenses in connection with the proceedings to set aside the auction sales thereof, as also other necessities of the mortgagor, and

(*c*) 6 lakhs to satisfy a mortgage against the "C" properties in favour of a Sowcar of Hyderabad, who was in possession of those properties with an agreement to reconvey the same on receipt of 6 lakhs of rupees.

The Raja of Tuni agreed to lend this amount of 11 lakhs of rupees and to apply the same for the above purposes, on the security of the "A," "B" and "C" properties, with the addition of another small property described in Schedule D of Ex. A, this last, it is suggested, being included merely with a view to registration in the District in which it was situated.

The terms of this agreement were embodied in the two deeds, Ex. A and Ex. I, which were executed and registered on the same date—the 13th March, 1909.

Thereafter, the mortgagee paid off the three mortgage decrees against the " A " properties and certain other expenses in connection therewith and the amount so applied was more or less 2½ lakhs of rupees.

He also paid into Court a sum of Rs. 1,93,617 in respect of the mortgage decree against the " B " properties.

These properties (23 villages in Taluk Pamur) had been sold, together with 4 other villages in the same Taluk, in court auction and the mortgagor had applied to set aside those sales. The first court confirmed the sales of the 4 villages and set aside the sales of the " B " villages (23 in number). Both sides appealed to the High Court, which confirmed all the sales (*i.e.*, of all 27 villages) and the mortgagee lost his possession of the " B " properties. He could not, however, get back the money he had paid into Court as stated above till the 24th April, 1912, when his widow and representative got back from the Court Rs. 1,80,412—10—0 out of the Rs. 1,93,617—0—0 paid in. It is admitted that he did not receive any interest on the latter sum for the period while it was in Court, *i.e.*, until the 24th April, 1912, nor any interest thereafter on the balance which remained unpaid, *i.e.*, on the difference Rs. 13,205—6—0.

The mortgagee did not pay the 6 lakhs of rupees to the Hyderabad Sowcar and consequently the " C " properties never came under the operation of the mortgage (Ex. A) and no question arose in the suit with reference thereto.

The mortgagor remained in possession of the " A " properties under the lease (Ex. I), but did not pay any portion of the stipulated rent. The mortgagee (lessor) obtained a money decree in respect of seven instalments of the rent, but it is common ground that that decree as well as the remaining five instalments of rent remained unsatisfied.

The mortgagee died in 1911 and in 1913 his widow and representative transferred all his interest in the mortgaged properties to defendant No. 1, who thereafter sub-mortgaged it to defendant No. 2. Defendants 3 and 4 are the representatives of the original mortgagor and mortgagee respectively.

The equity of redemption of the " A " properties was sold in execution of a money decree against the mortgagor and purchased by the plaintiff, who instituted the present suit on the 21st December, 1915, against the defendants above described for redemption and possession.

The plaintiff alleged that defendant No. 1 was claiming a great deal more than the sum (Rs. 2,34,150) which he admitted to be due on the mortgage of the " A " properties; and he asked that an account might be taken of the amount due to the defendant No. 1 on the security of the properties and that on payment of the

same by the plaintiff, the defendants be directed to deliver to the plaintiff the mortgage instruments and all documents in their possession relating to the properties and to deliver possession of the said properties to the plaintiff without any encumbrance and to execute and register an acknowledgment in writing to the effect that the interest created by the mortgage has been extinguished.

The defendant No. 1 annexed an account to his written statement under which he claimed that a sum of Rs. 5,63,172—15—11 was due on the mortgage, including the arrears of rent above mentioned, and he also asked that an account should be taken of all monies due to him and the plaintiff declared entitled to redeem only on payment of the whole amount found due, together with his costs of suit.

Now, a portion of the defendant's account consisted of claims for compensation based on several grounds, such as the alleged misdescription of one of the villages mortgaged, the fact that another of the villages was allowed to be sold for arrears of revenue on the alleged fraudulent compromise of the litigation for setting aside the sale of the " B " villages and so forth. These formed the subject of Issues Nos. 7, 8 and 9 in the trial court and were all decided in favour of the plaintiff. Both the Subordinate Judge and, on appeal, the High Court held that these were all claims for breach of contract sounding in damages and were not in any way charged upon the property. They therefore held that the plaintiff, as assignee of the equity of redemption, could not be required to pay such damages as a condition of redemption. Some of these claims were repeated in the case for the appellant-defendant before this Board, but as Mr. Upjohn, on behalf of the appellant, abandoned them at the hearing, their Lordships need not deal with them except in connection with the question of the costs of this appeal.

The questions remaining for consideration are : 1st, Is the defendant entitled to credit in the mortgage account taken in this suit for the amounts he paid in connection with the " B " properties and, if so, at what rate and for what period is he entitled to interest thereon ? And 2nd, Is the defendant similarly entitled to credit for the arrears of rent remaining unpaid in respect of the " A " properties,? These formed the subject of Issues Nos. 4, 5 and 12 in the first Court, which decided them all against the defendant.

That Court held as a matter of construction that Ex. A amounted to three different mortgages for three different amounts on three distinct properties, and that the mortgage for $2\frac{1}{2}$ lakhs on the " A " properties was distinct and separate from the other two items of $2\frac{1}{2}$ lakhs and 6 lakhs, which were similarly received for the respective purposes of relieving the " B " and " C " properties from the encumbrances subsisting thereon. In that view the Subordinate Judge disallowed the claims in connection with the " B " properties and went to the length of splitting up the stamp

duty on Ex. A, allotting half of it only, viz., Rs. 6,000 out of Rs. 12,000, to the claim against the " A " properties.

On the second point, he held that the mortgage (Ex. A) and the lease (Ex. I) were separate and severable transactions, that the arrears of rent payable under Ex. I were not charged upon the " A " properties, either as to principal or interest, and that the plaintiff was not bound to pay the sums claimed in respect of such arrears.

Taking the account on this basis, the Subordinate Judge decreed that (1) " if the plaintiff pays into Court on or before the 30th June, 1917, the amount declared due, viz. Rs. 2,70,752—1—9, the defendants should deliver up to the plaintiff . . . all documents in his possession or power relating to the mortgaged property and should, if so required, retransfer the property to the plaintiff free from the mortgage and from all encumbrances, etc., and shall put the plaintiff in possession of the property, and (2) that if such payment was not made on or before the 30th June, 1917, the said mortgaged property should be sold."

The defendant appealed to the High Court. The learned Judges in that Court, differing from the Subordinate Judge, held as a matter of construction that Ex. A could not be treated as creating three distinct mortgages and that there was nothing in its provisions to cut down the plain words of the instrument by which the properties in the four schedules were charged in respect of the whole debt. They, therefore, modified the decree of the first Court by including in the mortgage debt the difference between the amount paid into court by the mortgagee in respect of the " B " properties and the amount drawn out by him, viz., Rs. 13,204—6—6, with interest thereon at 10 annas per cent. per mensem from the 31st January, 1911, up to 19th April, 1920 (date of High Court decree). They further modified the lower Court's decree by giving to the defendant the whole of the Rs. 12,000 for stamps, etc.—the additional sums thus allowed amounted, with interest, to Rs. 29,711—8—2.

The only objection to this part of the High Court's decree urged before this Board is that the appellant is entitled to interest on the entire amount paid into Court by the mortgagee (Rs. 1,93,617) from the time he lost possession of the " B " properties, *i.e.*, to the 24th April, 1912, at 10 annas per cent. per month, in addition to the interest on the difference (Rs. 13,204) allowed by the High Court. Their Lordships are of opinion that this contention is well founded and the High Court decree must be varied so as to give effect to it.

A second claim urged on behalf of the defendant appellant to a sum of Rs. 5,572—14—8, is based on the ground that the mortgagor had collected a portion of the rents of the " A " properties between the 13th March, 1909, and the 30th June, 1909, and that this portion amounting to Rs. 5,572—14—8 was payable under Ex. A to the mortgagee. The Subordinate Judge, as well

as the learned Judges of the High Court, found against the defendant-appellant in respect of this claim and their Lordships see no reason to disturb this concurrent finding of fact.

A more important point in the case relates to the arrears of rent payable under the lease (Ex. I). As stated above, the mortgagor never paid any of the instalments of rent payable under the lease (Ex. A). For seven of these instalments a decree was obtained in O.S. No. 17 of 1912 and a small sum of money realised in execution of that decree; the remaining five instalments also remained unpaid and the defendant claimed that two sums of Rs. 30,997—14—1 and Rs. 38,684—11—0 remained due in respect of these arrears of rent with interest thereon. Their Lordships understand that there is no dispute as to the amount, but the plaintiff contends that these sums are not in any way charged upon the " A " properties and that he was not bound to pay the same for the purposes of redemption.

The Subordinate Judge decided in favour of the plaintiff on the ground that the lease (Ex. I) did not create any charge on the corpus of the " A " properties. The High Court upheld that part of his decision, but on different grounds. The learned Chief Justice (the other learned Judge not dissenting) rejected the Subordinate Judge's construction of the lease and held that the annual payments thereby provided were charged on the land in question by Ex. I. The Chief Justice held, however, that by virtue of Section 62, clause (*b*), of the Transfer of Property Act, the plaintiff had a statutory right to redeem the usufructuary mortgage created by Ex. A without paying off the charge for arrears of rent under Ex. I. Mr. Justice Sheshagiri Ayyar agreed with the Chief Justice and was further of opinion that apart from Section 62, clause (*b*), on which the Chief Justice relied, the defendant's claim on this head failed because there was no right in Indian law in a mortgagee to require all the mortgages on a property to be redeemed together.

It is contended before this Board on behalf of the defendant-appellant that the two deeds Exhibits A and I should be read together as they form parts of one transaction, the lease being in the nature of machinery for the purpose of realising the interest due on the mortgage. Further, that Section 62 of the Transfer of Property Act has no application to the case as it applies only to a case of an usufructuary mortgage pure and simple, which Ex. A is not, as it contains covenants for payment both of principal and interest The section which the appellant's counsel urges as being applicable to the facts of this case is section 61 of the Transfer of Property Act, which enacts by implication that a mortgagor seeking to redeem shall not be entitled to do so without paying any money that may be due under a separate mortgage or charge, if the latter relates to the same property.

Their Lordships are of opinion that these contentions on behalf of the appellant must prevail. A number of authorities

on the sections of the Transfer of Property Act were cited which their Lordships have considered, but upon which they think it unnecessary to comment. In their Lordships' view, Section 62 of the Transfer of Property Act applies only to usufructuary mortgages pure and simple, and is not in any way inconsistent with the provisions of Section 61.

The mortgage in question, Ex. A, no doubt is usufructuary, but it is something more, inasmuch as it contains covenants on the part of the mortgagor to pay both principal and interest. Their Lordships are disposed to agree in the view taken of the mortgage by the learned Chief Justice of Madras that it was an anomalous mortgage or at least a combination of a simple mortgage and an usufructuary mortgage. In no other view could the preliminary decree of the Subordinate Judge directing a *sale* of the property in default of payment, or the final decree of the High Court which embodies such direction, be made. If, again, apart from the usufructuary mortgage there is a simple mortgage or a charge subsisting on the properties in favour of the defendant by virtue of Ex. I, the decrees both of the Subordinate Judge and of the High Court must be held to be erroneous in so far as they direct that on payment of the amount due under Ex. A the defendant should deliver possession of the property free from encumbrance and all documents relating to the mortgaged property. Counsel. on behalf of the first respondent, conceded that that portion of the decree should be set aside, but argued that the plaintiff should be relegated to a separate suit to enforce the simple mortgage or charge under Ex. I.

It seems to their Lordships that the course suggested by the first respondent's counsel would lead to a circuity of action and would be contrary to the provisions of Order 34, Rule 1, of the Code of Civil Procedure, which requires all persons having an interest in the mortgage security to be joined as parties to any suit relating to the mortgage. The object of that provision is that all claims affecting the equity of redemption should be disposed of in one and the same suit. If the defendant did not set up his charge for the arrears of rent in this suit serious questions might well arise as to whether he would be entitled subsequently to bring a suit to enforce that charge. Their Lordships are of opinion that the defendant-appellant is entitled to add the sums in question to his claim in this suit, with interest thereon, from the due date of the mortgage, viz., 13th of March, 1915.

The judgment of the High Court should be varied on the points mentioned above and the case remitted to that court in order to make a decree on the above basis, and their Lordships will humbly advise His Majesty accordingly.

The respondent No. 1 must pay the appellant's costs of this appeal, less a sum of £50, which their Lordships assess as being payable to him by the appellant in respect of unsustainable claims abandoned only at the hearing of this appeal.

In the Privy Council.

DEWAN BAHADUR PANAGANTI
RAMARAYANIMGAR

v.

SRI RAJAH VELUGOTI GOVINDA KRISHNA
YACHENDRA BAHADUR VARU, MAHARAJA
OF VENKATAGIRI, AND OTHERS.

DELIVERED BY LORD SINHA.

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