

Mohamedali Jaffer Karachiwalla - - - - - *Appellant*

v.

Noorally Rattanshi Rajan Nanji and others - - - - - *Respondents*

FROM

THE COURT OF APPEAL FOR EASTERN AFRICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 2ND OCTOBER, 1958.

Present at the Hearing:

LORD RADCLIFFE

LORD TUCKER

MR. L. M. D. DE SILVA

[*Delivered by* LORD RADCLIFFE]

This appeal from the Court of Appeal for Eastern Africa relates to proceedings instituted in the Supreme Court of Kenya at Mombasa by the first respondent to enforce his security under a mortgage of certain land on the Island of Mombasa which was granted to him by the appellant. The second and third respondents hold prior mortgages of the same property, so that the mortgage now in question is a third mortgage.

The Supreme Court gave judgment in favour of the first respondent on the 11th November, 1954, upholding the validity of his mortgage. This judgment was followed by three orders in the same Court dated respectively the 15th November, 1954, the 21st January, 1955, and 20th May, 1955, the effect of which was to pass a final decree for sale of the mortgaged property and for satisfaction out of the proceeds of sale of the sums found due to the respective mortgagees on their several mortgages, the mortgagees being given liberty to apply for personal decrees against their mortgagor for payment of any balances due to them, if the proceeds of sale proved insufficient to satisfy them in full.

An appeal against these orders was dismissed by the Court of Appeal on 27th March, 1956. The mortgagor's main point in his argument before this Board has been to the effect that having regard to the provisions of Section 67 of the Indian Transfer of Property Act, 1882, as applied to Kenya, and to the terms of the third mortgage the first respondent was not entitled to obtain an order for sale from the Court. This point was not raised during the hearing of the case in the Supreme Court, which was concerned with other issues affecting the enforceability of the mortgage, but was argued, though unsuccessfully, before the Court of Appeal. The mortgagor has also raised two points, essentially procedural, which impugn in some respects the form of the Supreme Court Order dated the 21st January, 1955, which was a preliminary decree for sale. These points were raised neither before that Court nor before the Court of Appeal. For the reasons which will be mentioned more fully later it is not the intention of their Lordships to give any decision upon these procedural points which in the circumstances are not open to the appellant.

The appellant's main argument is that the proviso for redemption in the third mortgage amounted to an agreement that so long as the mortgage money and interest were paid up by 30th June, 1968, the mortgagor should be entitled to the return of his security on that date or

thereafter. It is not in dispute that the monthly interest stipulated for by the mortgage had fallen into arrear before proceedings were commenced or that, by virtue of this and notice given in respect of it, the principal moneys due on the mortgage had become immediately repayable: but the mortgage is so drawn, it is said, that nevertheless the undertaking for reconveyance on or after 30th June, 1968, remains in force so that until that date the mortgagor has a continuing chance of recovering his property by tendering the full amount of principal and interest contracted for. Such an undertaking then—and, if the premise is right the conclusion may well follow—amounts to a “contract to the contrary” within the meaning of Section 67 of the Transfer of Property Act, 1882, and therefore precludes the possibility of a sale or foreclosure under the process of the Court before that date.

The section in question runs as follows:—

“In the absence of a contract to the contrary, the mortgagee has at any time after the mortgage-money has become payable to him and before a decree has been made for the redemption of the mortgaged property, or the mortgage money has been paid or deposited as hereinafter provided, a right to obtain from the Court an order that the mortgagor shall be absolutely debarred of his right to redeem the property, or an order that the property be sold.”

To assess the validity of this contention it is necessary to decide what the contractual scheme of the third mortgage amounts to. It is a somewhat complicated document which is not drawn with any great nicety of draftsmanship. But for all that there is no need to make any mystery about its effect or the expressed intentions of the parties. Properly understood, the document appears to their Lordships to afford no support to the appellant's highly improbable construction. It is best to set out a summary of the main provisions of the mortgage, as they affect this point, in the order in which they appear in the deed and then to say what, read together, they amount to as a contractual scheme.

(i) The mortgage was by indenture dated the 29th October, 1951, and was made between the appellant as mortgagor and the first respondent as mortgagee.

(ii) The deed recited first and second prior mortgages of the same date and stated that the consideration for the mortgage was the sums of 130,000 shillings advanced and 20,000 more shillings to be advanced to the mortgagor by the mortgagee upon the security of the intended third mortgage.

(iii) The mortgagor covenanted in consideration of the sums of 130,000 shillings lent and 20,000 shillings to be lent on the 15th November, 1951, to pay to the mortgagee the sum of 150,000 shillings on the 30th June, 1968, together with interest thereon at varying rates on different sectors of the total sum, all such interest to “be paid . . . at the end of every month as it accrues due and becomes payable.”

(iv) Certain leasehold interests in land on the Island of Mombasa were assigned to the mortgagee as security for the mortgage, subject to the two prior mortgages.

(v) The mortgagor entered into a number of covenants with the mortgagee, among them covenants to complete buildings on the mortgaged property; to pay all sums becoming due either for principal or interest on the prior mortgages; to observe the terms of the head leases of the land mortgaged and to pay ground rent, rates, taxes and outgoings; to keep the buildings on the site insured and to pay the premiums required.

(vi) Three of the mortgagor's covenants were in the following terms:

“(e) Should the mortgagor make any default in payment of the ground rents, municipal rates and taxes, insurance and payments of premium or premia in respect thereof or should he fail to pay interest regularly and punctually to the mortgagee under the first and second mortgages or should he fail to pay the interest due on the principal sum or sums advanced regularly as hereinbefore provided or should he fail to carry out any of the covenants and conditions and agree-

ments herein contained then in any one of such cases the mortgagee shall be at liberty to demand the repayment of the principal sum together with all interest due thereon notwithstanding the time for repayment thereof hereinbefore provided and shall be entitled to recover the same through a Court of law Provided Always that the mortgagee shall not enforce his right to claim and recover the whole principal sum in event of any of the above defaults until after 1st January, 1952, and even after the said date until after a five week previous written notice is first given by the mortgagee to the mortgagor demanding the compliance of any default or breach as aforesaid AND PROVIDED ALWAYS THAT the mortgagor shall not permit any increase of amount under either or both of the two previous mortgages in respect of interest, premium ground rents, municipal rates or in any other way whatsoever AND should the mortgagor permit such an increase after the 1st January, 1952, the mortgagee shall also be entitled if after a notice in writing of five weeks any of such amounts are not paid up to claim the whole amount of loan and interest forthwith notwithstanding the period of repayment.

(f) He the mortgagor agrees that he will repay the sum of Shs.150,000/- (Shillings one hundred and fifty thousand) to be advanced hereunder by twenty five half yearly instalments of Shs.5,000/- (Shillings five thousand) the first of such half yearly instalments to be paid on the 30th day of June, One thousand nine hundred and fifty-two and the remaining twenty four at the end of every six months and thereafter the balance by eight half yearly instalments the first seven instalments of Shs.3,000/- (Shillings three thousand) each and the eighth instalment of Shs.4,000/- (Shillings four thousand) thus paying off the whole amount by the 30th day of June One thousand nine hundred and sixty-eight as hereinbefore provided and from such half yearly payments the mortgagee shall accept Shs.3,000/- (Shillings three thousand) towards the reduction of the sum of Shs.100,000/- and Shs.2,000/- towards the reduction of the first Shs.25,000/- and after the first Shs.25,000/- has been paid of the subsequent payment of Shs.2,000/- towards the reduction of the second Shs.25,000/- and after such payments interest will run on the balance or balances due in respect of the respective sums. Provided Always and it is hereby agreed that the mortgagee shall appropriate the first payment or payments towards the amount or amounts expended by him the mortgagee for insurance, interest due and other outgoings and only after satisfaction in full of all such payments the payments will be applied towards the reduction of the principal sum or sums.

(g) The mortgagor shall be entitled to make payment of any amount but not less than Shs.5,000/- at any time other than the instalments hereinabove stated towards the amount due under this mortgage and the same shall be appropriated by the mortgagee as stated in Clause (f) hereof."

(vii) Finally, the proviso for redemption took the form of a covenant by the mortgagee with the mortgagor as follows:—

" . . . if the Mortgagor shall repay the total principal sum advanced under these presents together with interest thereon due as hereinbefore provided by the 30th day of June One thousand nine hundred and sixty-eight the Mortgagee will at any time thereafter after the expiry of the stipulated date at the request and cost of the Mortgagor re-assign and surrender the lands and all buildings to the Mortgagor as he the Mortgagor may direct."

There are, of course, certain parts of this scheme which are not capable of being reconciled with each other in literal terms. If the mortgagor was under obligation to repay the whole 150,00 shillings on 30th June, 1968, he could not at the same time be required or entitled to pay off parts of that sum by instalments during the intervening period. If the principal money became immediately payable in default of interest, etc., under

Clause (e), the mortgagor could not continue thereafter to be under a simultaneous liability to pay up either the principal sum on 30th June, 1968, or instalments of it at fixed dates in the interim. A similar difficulty on the wording of the document would arise if the mortgagor exercised his power of anticipating mortgage payments under Clause (g).

But these difficulties are not so great as to call for any such desperate expedient as rejection of one or more parts of the deed on the ground of inconsistency. On the contrary, their Lordships are of opinion that the scheme agreed upon was easily intelligible from the document read as a whole and its total effect can be summarised under the following heads:—

(1) The mortgagor was to pay interest monthly on sums outstanding on the mortgage, to pay off the principal by the instalments and at the dates specified in Clause (f) and, if the instalments were paid off according to that schedule, thus wiping out the debt by 30th June, 1968, and interest were paid monthly in the meantime, the security was to be reconveyed on or after that date.

(2) On the other hand, if the mortgagor failed to observe any of his various covenants and obligations under the mortgage deed, including his obligation to pay instalments and current interest, the mortgagee was entitled from 1st January, 1952, to give five weeks' notice calling in the whole principal sum then outstanding and to resort to a Court of law to enforce the payment by any form of process which it might be within the power of the Court to grant.

So construed, the mortgage deed contains no "contract to the contrary" within the meaning of Section 67. The appellant's argument seeks to extract such a contract from the proviso for reconveyance by interpreting that proviso as meaning that, no matter to what extent the scheme of payment provided by the earlier clauses or the covenants for protecting the value of the security had broken down, so that the enforcement provisions of Clause (e) had had to be brought into play, nevertheless the mortgagor was still entitled to have the security retained, unsold or unforeclosed, until June, 1968, on the chance that he might turn up by that date with a full tender of principal and interest owing. No doubt there can be cases in which, either by accident or design, a proviso for redemption or reconveyance may express some such arrangement between mortgagor and mortgagee. The case of *Williams v. Morgan* [1906] 1 Ch. 804, which was referred to in argument, is an instance of such a case. But this mortgage is not one of them. It is sufficient to mention two reasons for that conclusion. In *Williams v. Morgan* the condition upon which the mortgagee was to return to the mortgagor his pledged estate had not been broken. The obligation stood. Here the condition has been broken, since the proviso requires that interest on the mortgage money should have been paid "as hereinbefore provided", and the foregoing provisions of the deed call for interest to be paid monthly and not otherwise. The obligation does not therefore stand. Secondly, the mortgage in *Williams v. Morgan* contained no stipulation comparable with Clause (e) of the present deed. Clause (e) explicitly negatives the idea that the mortgagee is in all circumstances to wait until June, 1968, before enforcing his security. There is no warrant for cutting down the meaning of such phrases as "recover the same through a Court of law" and "enforce his right to claim and recover . . ." to extend only to an action for personal debt. But, if the words of Clause (e) are accorded their natural meaning and the proviso for reconveyance which follows is read in the light of them, it must result that the rights and obligations created by that proviso are only binding so far as they are not rendered incapable of effect by an earlier assertion of the mortgagee's rights under Clause (e).

Their Lordships will now notice the procedural points which were raised by the appellant in argument before them. It is desirable that they should be attended to even though no decision is given upon them, since they are not insubstantial and it is possible that they indicate some

looseness of practice in the Courts in Kenya to which the attention of the judicial authorities there might usefully be directed.

The first point made is that the order of the Supreme Court dated the 15th November, 1954, and the two consequent decrees for sale were erroneous in that the sale was ordered to take place if the mortgagor did not bring into Court within the time specified the sums of money due on all three outstanding mortgages: whereas, it is argued, the condition required of him should have been limited to his bringing into Court the money due on the third mortgage only. The third mortgagee was the sole plaintiff in the action, the sole party explicitly claiming relief, and the contingent sale decreed by the Court for the purpose of affording that relief should not have been made dependent upon compliance with a condition the effect of which was to secure payment in full to the first and second mortgagees as well, parties who were asking for no relief in the action. The form of order for foreclosure or sale which is prescribed by Sections 86 and 88 of the Transfer of Property Act, 1882, does not envisage that the preliminary decree will provide for the mortgagor bringing into Court anything more than the sum due to the mortgagee who is the plaintiff seeking relief, and the Court, it is said, had no power to extend the content of such an order by requiring security for the sums due on the first and second mortgages as well.

To decide upon the validity of this argument would require a careful review of the regulations and practice of the Kenya Courts. If the matter were being dealt with under English practice, there would be force in it, because the prior mortgagees would not be likely or necessary parties to the third mortgagee's action against the mortgagor and the sale of that mortgagee's security could take place without affecting their rights, which would have priority over the rights of a purchaser of the property sold. But it does not follow that the position was the same in Kenya. In this suit the prior mortgagees were in fact joined as defendants. It may even be that, having regard to Section 85 of the Transfer of Property Act, they must be regarded as necessary parties. Whether they were so or not depends on the meaning to be attributed to the words "property comprised in a mortgage" in that section. In the event neither of these mortgagees put in a defence: their counsel's submission, as recorded by the trial Judge was, "If plaintiff succeeds, provision should be made for prior rights of first and second mortgagees. Instructions are to support Patel" (counsel for the plaintiff) "in all his arguments." Presumably they must be taken as consenting that the sale that was ordered should be made free from their securities within the meaning of Section 96 of the Act. If so, it would follow necessarily that provision would have to be made for an account of the sums respectively due to them and for payment of these sums out of the proceeds.

The appellant maintained that in raising this point about the form of the Orders he was raising a point of jurisdiction before the Board to which attention must be given as of right. Their Lordships do not accept this view at all. The most that can be said against the Orders is that in one respect they may have subjected the mortgagor to a condition more burdensome than that which in law could be required of him. But every Order that is defective in form in that sense is not an Order made without jurisdiction, since an Order may be wrong without its being beyond the capacity of the Court to make it. Whether in this particular case the right forms were gone through or not it seems plain that, with all the parties before the Court and the prior mortgagees explicitly asking that their prior rights should be protected, they either were treated as or could have put themselves in the position of being additional plaintiffs claiming relief against the mortgagor. If he had made at the time the objections which he has sought to raise now, any necessary adjustment of parties or pleadings could have been made. In the circumstances their Lordships are of opinion that he must abide by the result and that no question of any want of jurisdiction arises.

The second point of procedure raised by the appellant requires only brief notice, since it appears that it is still open to him to take it, if he wishes to, in the Courts of Kenya. The Preliminary Decree for Sale

dated the 21st January, 1955, contained among other directions provisional personal decrees against the appellant in favour of the three mortgagees for the amount of any balance found due to them respectively and not provided for out of the proceeds of sale of the mortgaged property. The appellant draws attention to the fact that under Rule 21 of the Kenya Rules of Court (Mortgage Suits) no personal decree may issue against a mortgagor for a balance of money payable to any party not a plaintiff in the suit.

This point is another one which, if valid, could probably have been disposed of in the course of proceedings by amendment. It should have been taken at the time of the drawing up of the Preliminary Decree. It was not, nor was any reference made to it before the Court of Appeal: and it is now of contingent importance only since the Final Decrees which for this purpose superseded the Preliminary Decree, did not pass any personal decrees for payment but merely directed that, if the net proceeds of the sale then ordered were insufficient to pay the amounts found due and subsequent interest and costs in full, the several mortgagees should be at liberty to apply for personal decrees for the amount of the balance. If any such application is made by either of the respondent mortgagees, the appellant can put forward his point that, as defendants in the suit, they cannot as such be granted a personal decree against their mortgagor.

Their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellant must pay the respondents' costs.

To the Editor of the

Journal of the Royal Society

of Medicine and Natural Philosophy

London

Dear Sir,

I have the honor to acknowledge the receipt of your letter of the 10th inst.

Yours faithfully

J. S.

In the Privy Council

MOHAMEDALI JAFFER KARACHIWALLA

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NOORALLY RATTANSHI RAJAN NANJI
AND OTHERS

DELIVERED BY LORD RADCLIFFE