Privy Council Appeal No. 31 *of* 1918.

Madhorao Narayan Ghatate - - - - - - *Appellant*

v.

Gulam Mohiuddin and others - - - - - *Respondents*

FROM

THE COURT OF THE JUDICIAL COMMISSIONER, CENTRAL PROVINCES, INDIA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 26TH MAY, 1919.

Present at the Hearing

VISCOUNT CAVE.
LORD SHAW.
LORD PHILLIMORE.
SIR JOHN EDGE.
MR. AMEER ALI.

[*Delivered by* LORD PHILLIMORE.]

The suit to which this appeal relates was brought to enforce a mortgage dated the 15th October, 1877. A village named Lonhara had just been purchased by the mortgagors and they desired to raise money to enable them to complete the purchase. They had bought one half of the village free from incumbrances, but the other half was mortgaged to one Kewalram for Rs. 3,000, as was known to all parties. There was, moreover, a further incumbrance upon it in the shape of a second mortgage also to Kewalram for Rs. 900. This mortgage appears to have been concealed from the purchasers by their vendors.

The title to the village being in this state the mortgage in suit took the following form. The arrangement made was that the mortgagee should receive, in addition to the sum advanced, a further sum equal to half the principal, which would take the

place of interest, making Rs. 7,500 in all, and that this should be repayable by six yearly instalments of Rs. 1,250, and that the mortgagee should enter at once into possession of the unincumbered half of the village; that as to the other half, on the expiry of the term of Kewalram's mortgage, the mortgagee might pay off the Rs. 3,000, add that sum to his security, and take possession of the other half of the village. In that event there were to be certain provisions as to the expenses of management and as to the allowance of a sum by way of maintenance to the mortgagors. These matters and certain other provisions as to interest were worked out in detail, but are not now material to be considered. Finally, there was a proviso that the mortgagors might at any time redeem the mortgage on payment of the principal sum due with interest at the rate of 1 per cent. per mensem.

Upon the execution of the mortgage the mortgagee entered into possession of the half of the village and he has remained in possession ever since. He did not pay off Kewalram, but after many years the representatives of the mortgagors brought a suit against Kewalram's representatives and obtained a decree for redemption on payment of Rs. 3,900. In order to raise this money and certain other sums which they required the mortgagors made a fresh mortgage for Rs. 5,000 to one Tukaram and others.

On the 6th August, 1910, the successor of the original mortgagee under the mortgage of the 16th October, 1877, brought this suit, making the representatives of the mortgagors, and Tukaram and his co-parceners defendants. His claim was primarily to have the whole village brought to a judicial sale, and secondarily and in the alternative that he might be let into possession of the second half of the village. To this claim various answers were made, the most important being that upon the true taking of the accounts the mortgagee had paid himself all the money due to him, that the mortgage being an usufructuary one there was no right to enforce it by sale of the property, and that the mortgagee had lost his opportunity of redeeming Kewalram and with it his right to enter into possession of the half of the village mortgaged to him.

The Additional District Judge, before whom the suit was tried, decided all points in favour of the mortgagee, finding that there was due to him for principal Rs. 7,500, and for interest since the date when the agreed sum should have been paid Rs. 20,794, while he had received in respect of his possession only Rs. 4,392, and giving him a primary decree for sale upon his paying into court for the benefit of Tukaram and his co-parceners Rs. 6,027 and thus redeeming them. This decree is dated the 31st July, 1914. On the 28th January, 1915, the plaintiff, having made the payment as ordered, got a final decree as against Tukaram and his co-parceners for redemption of his half share of the village.

From the decree of the Additional District Judge, in so far as it affected the successors to the original mortgagors, an appeal

was preferred to the Court of the Judicial Commissioner of the Central Provinces and was heard by Additional Judicial Commissioners, Batten and Stanyon. They by their decree, dated the 19th July, 1915, allowed the appeal and dismissed the plaintiff's suit with costs.

When the case came before them they considered that the first point to be determined was whether the mortgage of 1877 was one which warranted an application for a judicial sale, and they came to the conclusion that it was not.

It is stated in their judgment that the case of the plaintiff was that the mortgage in question was a simple mortgage usufructuary—in other words, a combination of a simple and an usufructuary mortgage—while the contention on behalf of the defendants was that it was a mere usufructuary mortgage ; that in the opinion of the Judicial Commissioners it was neither one nor the other, but an agreement of a special kind, such as might well be made before the Transfer of Property Act, 1882, of the kind classed as an anomalous mortgage in section 98 of that Act ; that this being so, what had to be considered was the intention of the parties as gathered from the terms of the instrument ; that there had been no thought of sale, and that, therefore, the plaintiff had no right to a judicial sale.

There are certain clauses in the mortgage which might be construed standing by themselves as importing a personal covenant by the mortgagors to pay the sum due, and it was upon these clauses that the Additional District Judge had placed reliance as indicating that the mortgage had the incidence of a simple mortgage ; but in the opinion of the Court of Appeal these passages were not enough to warrant a decision that the parties contemplated a possible sale. On the other hand, as the Court of Appeal pointed out, the mortgage could not be an usufructuary one, or, at any rate, not an immediate usufructuary one in respect of the half village mortgaged to Kewalram, inasmuch as the mortgagee could not get possession of that half till his term had expired.

After giving every consideration to the argument urged by Counsel for the appellant plaintiff, their Lordships see no reason to differ from the conclusion at which the Court of Appeal arrived as to this part of the case. They agree in their view of the nature of the mortgage, and that the true conclusion to draw from its terms is that the parties never contemplated a sale.

There remains, however, the subordinate question of the alternative relief claimed by the plaintiff in respect of the half village mortgaged to Kewalram. Under the terms of the mortgage of 1877 it was provided that the mortgagee might, at the expiry of Kewalram's term, pay Rs. 3,000 and then get possession of his half village. The plaintiff called evidence to show that Rs. 3,000 had been tendered in due course, and that they were refused because there was the additional but hitherto unknown second mortgage for Rs. 900. The Additional District Judge, who saw the witness, believed this

evidence. The Judicial Commissioners in the Court of Appeal disbelieved it, and disbelieving it they held in substance that the mortgagee had lost his opportunity of redeeming Kewalram, that, as they put it, he had abandoned that part of the transaction which offered him a further investment on the half share in possession of Kewalram, in consequence of which the intended usufructuary mortgage of that share and all the arrangements for management of the whole village and the payment of an annuity to the mortgagor failed to mature. Or it might be, they said, that though owing to the existence of the mortgage for Rs. 900 the mortgagee was justified in not completing the contract, still he could not drop his part of it and hold the mortgagors liable to fulfil their part. Accordingly they refused to the plaintiff his alternative relief.

It appears to their Lordships unnecessary to determine whether the alleged tender was or was not made. It is obvious that if it had been made it would have been refused, because Kewalram was entitled to the additional Rs. 900.

On the discovery of this additional charge of Rs. 900 the mortgagee might no doubt have paid it off, as well as the Rs. 3,000, a payment which it is somewhat quaint to describe as a "further investment," and added this sum as well as the Rs. 3,000 to his security. But he was under no obligation to do so; and till Kewalram was paid off in respect of both claims the mortgagee could not get possession of his half of the village. But at any time he could pay off these claims. They formed a prior incumbrance, and a puisne incumbrancer can always pay off a prior incumbrance, while the mortgagor, who has created both, has neither interest nor right to object. The proceedings in this case are somewhat complicated; but the devolution of title when examined is clear, and now that the plaintiff has redeemed Tukaram he has cleared that half of the village of prior incumbrances, and is entitled, under the terms of the mortgage of 1877, to have possession of the second half of the village, as he already is in possession of the first.

Their Lordships are therefore of opinion that this part of the plaintiff's claim should not have been dismissed, and their Lordships would propose to make an immediate order for giving the mortgagee possession, but for a further consideration. Owing to the view taken by the Judicial Commissioners in the Court of Appeal, it became unnecessary to go into one of the important questions in the suit, *i.e.*, whether the plaintiff and his predecessors in title had not received enough while in possession of the half village to pay themselves off.

The Additional District Judge, as already stated, took the view that they had only received Rs. 4,392, but upon this the Judicial Commissioners observed that they did not believe for one moment that the ridiculous figure put forward by the plaintiffs from accounts never rendered or explained to the

mortgagors represented anything like the income which they and their predecessors had actually realised in a possession of over 35 years; and, without putting it so strongly, their Lordships are of opinion that these accounts cannot be accepted without further investigation. They think that if the plaintiff desires the alternative relief he must submit to have the accounts properly taken in the Court of the Judicial Commissioner. If upon the taking of these accounts it should appear that any money is still due to him then he ought to be given possession of the second half of the village. In taking these accounts he should be allowed the sum paid by him to redeem Tukaram with all proper costs appertaining thereto. In these circumstances there should be no costs of the appeal, or in the Courts below.

Their Lordships will, therefore, humbly recommend His Majesty that the decree of the Court of the Judicial Commissioner should be varied, and that the plaintiff on making application to that Court within three months should be allowed to have the accounts taken as between mortgagee in possession and mortgagor, and that if, upon the taking of these accounts, it appear that any sum remain due to him, he should have a decree putting him in possession of the second half of the village till the liquidation of the debt, and that otherwise the decree of the Court below should stand, and that the decree should be further varied in so far as it made the plaintiff pay the costs in the first Court and on appeal, and that any costs paid under this decree must be returned.

In the Privy Council.

MADHORAO NARAYAN GHATATE

v.

GULAM MOHIUDDIN AND OTHERS.

[Delivered by LORD PHILLIMORE.]

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