Privy Council Appeal No. 5 *of* 1929.
Bengal Appeal No. 40 *of* 1927.

Srimati Sunitibala Debi - - - - - - *Appellant*

v.

Manindra Chandra Roy Chowdhury and another - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 30TH MAY, 1930.

Present at the Hearing:
LORD BLANESBURGH.
LORD RUSSELL OF KILLOWEN.
SIR LANCELOT SANDERSON.

[*Delivered by* LORD BLANESBURGH.]

This appeal will, it is to be hoped, bring to its close a prolonged litigation between near relatives, carried on at enormous expense for nearly 27 years, that is to say, since shortly after the month of November, 1903, when one Sarat Chandra Roy Chowdhury died leaving him surviving the appellant, his daughter by a predeceased wife, and two widows, of one of whom the respondents, cousins of the appellants, are the successors in interest.

The litigation has been concerned with the property of Sarat Chandra Roy. His widows propounded a will in their favour, alleged to have been executed by the deceased on the day of his death. Their application for probate of that will was opposed by the appellant, who claimed to have succeeded to her father's property under an earlier will of his, dated the 21st September, 1892. The District Judge to whom the widows' application was made rejected as a forgery the will they put forward, and refused to admit it to probate. The widows appealed

to the High Court of Judicature at Fort William, whereupon the Administrator-General of Bengal, as executor of the earlier will of 1892, sought to prove it in the same High Court. The widows entered a caveat to this proceeding. The result was a compromise, of which the present suit is the outcome. Commenced so long ago as the 22nd March, 1909, it has proceeded ever since for one purpose or another, and with many re-arrangements of parties in its course. Of the diverse questions which in its different stages have been raised, some of substance, but as many of mere form, all have now been disposed of save that which is the subject of the present appeal.

As a result of the judgment of the Board of the 30th May, 1919, the suit when it finally came on for trial before the learned Subordinate Judge of Rangpur had become in his words, "one for the entire mortgage money by the assignees of the entire body of mortgagees who pray for the sale of the entire mortgaged properties." Since then, a compromise with the assignees of one of the mortgagees has been reached. But by the respondents the assignees of the other the suit has been waged relentlessly against the appellant, who, under the greatest financial stress, and ultimately only by the special leave of His Majesty in Council, has been enabled to bring before the Board the, to her, vital question with which their Lordships are now required to deal.

Unfortunately, the extravagance which has for so long characterised this litigation remains an outstanding feature of the appeal. Its subject matter, vital though it be to the appellant by reason of the amount involved, lies within the narrowest compass and really raises only a short question of construction of the mortgage deed in suit. The appeal has, nevertheless, been presented to their Lordships in a printed record of no less than 411 pages, to only a fraction of which during the course of the argument was any reference whatever made. Their Lordships do not hold the appellant responsible for this particular extravagance—the printing was presumably thought to be necessary as a result of threatened contentions of the respondents which were not ultimately presented to the Board. But the extravagance of it all is to be deplored. Such unnecessary expenditure in litigation is enough to bring the administration of the law into deserved disrepute.

The facts explanatory of the present question can be succinctly stated. One of the terms of settlement of the original litigation was that probate of the will of the 21st September, 1892, should be granted to the Administrator-General, and that upon the execution by the widows in favour of the appellant of a deed of relinquishment of all their rights in the testator's estate, the appellant would, as residuary legatee under that will by deed covenant to pay to the widows the sum of Rs. 80,000 each, with interest thereon at the rate of 6 per cent. per annum from the date of execution of the deed, and would charge

with the payment of these sums of Rs. 80,000 and interest the residuary estate of the testator to which she was, under the will, entitled, subject to such existing charge or charges thereon as had already been created by her. The deed of covenant and charge was to be prepared by the solicitors of the widows and approved on behalf of the appellant by her solicitors.

There was then outstanding, it appears, a mortgage dated the 14th April, 1904, whereby the appellant had charged in favour of one Aga Muhummad Baquir Ispahani to secure advances with interest, certain properties forming part of the testator's estate. In these circumstances, it might have been supposed, if regard were had to the terms of settlement only, that the deed to be prepared by the solicitors for the widows would have made the charge in their favour, subject to Aga Muhammad's mortgage of the 14th April, 1904. It might also have been supposed that it would contain no provision anywhere for payment of compound interest. The draft mortgage, however, which was in fact sent for approval to the appellant's solicitors, was not so framed in either respect. The draft showed the residuary estate of the testator in three schedules—schedule A, comprising the entirety of his immovable properties: schedule B, comprising his jewels, Government promissory notes and other movable property: schedule C, describing two of the immovable properties already comprised in schedule A. These last properties were the subject-matter of Aga Muhammad's mortgage. But, first, by the draft, the mortgage in favour of the widows was not made subject to that charge. On the contrary, Aga Muhammad was expressed to join in the deed for the purpose of postponing his security to theirs. He was expressed to convey, and the appellant to convey and confirm to the widows, the two immovable properties described in both schedules A and C, while the appellant was expressed to convey to them the other immovable properties comprised in schedule A, subject to a proviso for the redemption of the two properties described in schedule C, in favour of Aga Muhammad, and for the redemption of the properties described in schedule A in favour of the appellant. The appellant, by a further clause, was expressed to transfer and assign to the widows the movable property described in schedule B, subject to a similar proviso for redemption in her favour. Secondly, the draft contained a covenant for payment of the principal money with interest at the rate of 6 per cent. per annum, and in each of the two provisos for redemption and in the personal covenant, as well, there was inserted a provision for the payment of compound interest at 6 per cent. per annum on default in payment of three successive instalments of simple interest.

The draft concluded with a clause setting forth the terms of Aga Muhammad's participation in it, and that clause retained in the mortgage as ultimately executed is the provision of the deed upon the true effect of which the present appeal depends. It may conveniently be set forth at once.

"And it is hereby distinctly understood between the parties to these presents that nothing hereinbefore contained will any way affect or prejudice the right of the said Aga Muhammad Baquir Ispahani under the hereinbefore partly recited indenture of mortgage against the said mortgagor save and except that his right under the said Indenture of Mortgage of the said Aga Muhammad Baquir Ispahani in respect of the properties mentioned in the schedule C hereto shall be subject to the right of the said mortgagees as hereinbefore mentioned, that is to say, that in case the mortgagees, their heirs or assigns owing to the default of payment by the said mortgagor would have to sell the properties mentioned in the schedules A, B and C, the said mortgagees, their heirs or assigns shall in the first instance proceed to sell the properties mentioned in the schedules A and B, and shall not unless there be deficiency in the sale proceeds of the said properties mentioned in the said schedules A and B to cover their claim for principal, interest and costs sell the properties mentioned in the schedule C, which are subject to the mortgage of the said Aga Muhammad Baquir Ispahani."

Now, if the mortgage deed as executed had in all respects followed the terms of the draft as just stated, this last clause of it would have raised no difficulty. But the appellant's solicitor struck out from the draft the provision for payment of compound interest in the covenant for payment of principal and interest. He also struck out the provision in the proviso for redemption of the properties in schedules A and C. But, in circumstances which have not been gone into in this litigation, he left standing in the draft that same provision for the payment of compound interest in the proviso for redemption of the movable property in schedule B. And these alterations of his in their draft were accepted by the solicitors of the widows without comment, and the draft as so altered was engrossed and in due course executed by the appellant on the 5th March, 1907.

By the deed as thus executed both mortgagor and mortgagees are, it is now agreed, bound. That is not to say that either side is content with it. The attorneys for the widows had, it is suggested by the respondents, no authority to submit to the elimination from the draft of any of the provisions contained in it for payment of compound interest. The appellant's view, on the other hand, is that it was by a mere mistake or oversight on his part that her solicitor did not strike out as entirely unauthorised all three provisions relating to compound interest, and not two of these only. But no claim to rectify the mortgage deed as executed has been made by either party. The deed must accordingly be construed and given effect to as it stands, even if the result be that described by Lord Watson in *Stewart* v. *Kennedy*, No. 2, 15 App. Cas. 108, 123, viz., that the document is found to embody a bargain intended by neither of the parties to it.

What has now happened is this. The movable properties comprised in schedule B have had to be disposed of in payment of the testator's debts by the Administrator-General of Bengal as executor of his will. In view of that fact, the appellant, before the suit in its present shape came on for hearing, formally gave up all right to redeem that movable property and really invited the

learned Subordinate Judge to make with reference to it the decree which he did, amounting in effect to an order that the respondents might have it brought to sale for satisfaction of their full claim for principal costs and compound interest. But the appellant resisted, and the learned Subordinate Judge upheld her resistance, to the claim of the respondents that the immovable properties in schedules A and C were charged with and that the appellant under her personal covenant for payment was also liable for compound interest in all respects, presumably, as if the mortgage deed actually executed had conformed to the draft as originally prepared. It does not appear that before the learned Subordinate Judge any special claim was, in view of the last clause in the deed, made with reference to properties C, and it is not surprising that, in the absence of any application by the respondents for rectification of the mortgage deed, their claim as so presented failed, and that failure is reflected in the decree of the Subordinate Judge, which is dated the 24th March, 1924. On appeal to the High Court the respondents did not in their argument persist in their contention that under the deed as executed the properties A were charged with compound interest, but they still claimed that a personal decree for compound interest should be passed against the appellant, and, relying on the last clause of the deed, that, at all events, the properties C should be charged with compound interest. The learned Judges of the High Court rejected the first of these claims, but they upheld the second. Their reasons for doing so are expressed in these two sentences :—

> " As observed before, schedule B is subject to claim for compound interest and the clause as it stands must mean that if the principal and interest chargeable on properties mentioned in schedules A and B are not fully realised by the sale of those properties, the properties mentioned in schedule C may be sold to make up the deficiency. The properties in schedule C are thus made liable for the claim for compound interest."

This appeal is from the decree of the High Court of the 25th March, 1925, embodying that conclusion, and the only question their Lordships have to determine is whether it is right.

In their Lordships' judgment, the learned Judges of the High Court, in accepting so lightly the contention on this point presented to them by the respondents have not had present to their minds the strength of the considerations which militate against it. In their Lordships' view the contention is untenable, whether the case be treated as one purely of construction of the clause in question, or whether regard be also had to its plain purpose and function in the deed where it occurs.

Dealing first with the clause textually, their Lordships must, of course, primarily ascertain what is " the deficiency in the sale proceeds " without the existence of which there is to be no sale of the properties mentioned in schedule C. Does that " deficiency " represent the difference between the amount realised from the properties mentioned in schedules A and B,

and the mortgagees' claim for principal simple interest and costs or between that amount and their claim for principal, compound interest and costs. The answer, in their Lordships' judgment, is that the deficiency is the smaller amount, for the reason that "the deficiency" on the very terms of the clause is part of a sum for which the properties in schedule A, as well as the properties in schedule B, may be brought to sale. But it is manifest, and indeed the contrary is no longer contended by the respondents, that the properties in schedule A may not be brought to sale for any sum exceeding principal, simple interest and costs, and that so soon as that amount is realised for the mortgagees the charge upon these properties is satisfied. It is therefore clear to their Lordships that, however accidental the result may be, there can on the very words of the clause be no sale of properties C (the original charge upon which is identical with that upon properties A), except for a deficiency in respect of which properties A could, in the first instance, have themselves been brought to sale.

But this construction, amply justified by its mere words, is confirmed when the object and purpose of the whole clause is considered. It is merely a marshalling clause inserted in the deed for the benefit of Aga Muhammad, and defining the terms on which he postpones his security to that then created in favour of the widows. It could only be by words *luce clariora* that such a clause could be construed as having the effect of increasing the original charge upon the favoured property. It would be the more difficult so to construe them in this deed, seeing that the properties A of which those included in schedule C form a part remain charged, even on the respondents' view, with simple interest only.

It is unnecessary for their Lordships to pursue the matter further. As no objection may now be taken by the appellant to the order of the learned Subordinate Judge in relation to the properties comprised in schedule B, it is not open to the Board to consider its propriety. Nor need their Lordships discuss the question whether in such a suit as this—which is not a redemption suit—it would in any circumstances be permissible for the respondents to recover out of the properties C any sum in excess of that for which the appellant is liable under her personal covenant.

In their Lordships' judgment the proper order now to be made will be one allowing the appeal, discharging the decree of the High Court, and restoring that of the learned Subordinate Judge.

And their Lordships will humbly advise His Majesty accordingly.

The respondents must pay to the appellant her costs in the High Court and of this appeal.

In the Privy Council.

SRIMATI SUNITIBALA DEBI

v.

MANINDRA CHANDRA ROY CHOWDHURY AND ANOTHER.

DELIVERED BY LORD BLANESBURGH.

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