

Privy Council Appeal No. 19 of 1936

Nathu Mal - - - - - *Appellant*

v.

Raman Mal and others - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT LAHORE

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 18TH FEBRUARY, 1937.

Present at the Hearing :

LORD RUSSELL OF KILLOWEN.

LORD MACMILLAN.

SIR JOHN WALLIS.

[*Delivered by* LORD RUSSELL OF KILLOWEN.]

In this appeal their Lordships are called upon to construe a mortgage instrument which may be fairly described as a primitive piece of conveyancing, the language of which is sadly lacking in clearness and precision.

It is dated the 15th May, 1919. The parcels which constitute the security for the loan consisted of two houses and a shop in Amritsar, and two shops in the city of Lahore. The two shops in Lahore were subject to two mortgages in favour of one Raman Mal dated respectively the 26th February, 1906, and the 9th March, 1918, while the whole of the abovementioned property (including the two shops in Lahore) was subject to a mortgage in favour of one Lala Balla Mal dated the 5th May, 1917. It was for the purpose (*inter alia*) of paying off this last mentioned mortgage that a sum of Rs.13,500 was borrowed from the appellant Nathu Mal, and the repayment thereof was secured by the deed of the 15th May, 1919. The security was for a fixed term of two years and carried interest at a rate equivalent to 7½ per cent. per annum. After the two years had expired the rate rose to the equivalent of 9 per cent. per annum. The security was expressed to be subject to Raman Mal's mortgage of the 26th February, 1906, over the two shops at Lahore. The mortgagors were described as being "Ram Das for myself and as a guardian of Kishan Dayal minor, my adopted son aged 14 years and Bal Kishan."

The deed contains (according to the translation in the record) at the end of a lengthy clause (dealing with the absence of any encumbrances beyond the said mortgage of

Ram Das, with the rights of the mortgagee against the mortgagors personally, and his right on enforcing his security to interest at 9 per cent. per annum) the following words:—

“ If I sell any house out of the property I will pay the entire sale-proceeds thereof to the mortgagee and will not take credit for interest on the amount paid. In other words we will not deduct interest.”

Nathu Mal duly advanced the Rs.13,500, and Lala Balla Mal was duly paid off. More than two years later Ram Das and Bal Kishan purported to sell the two shops in Lahore to Raman Mal for the sum of Rs.13,000, and they executed in his favour a sale deed thereof dated the 22nd October, 1921. The sale deed recites Raman Mal's two mortgages, that a sum of Rs.4,215 is due for principal and interest thereunder, and that no other encumbrance exists on the property. It further recites that the price of Rs.13,000 has been paid, as to Rs.500 by deposit paid on the 23rd September, 1921, as to Rs.4,215 by deduction for principal and interest due on the two mortgages, and as to the balance Rs.8,285 in currency notes. It would appear that subsequently some Rs.7,000 were paid to Nathu Mal on account of his mortgage debt, but it has been found as a fact and cannot now be disputed that Nathu Mal was unaware of the sale to Raman Mal and never consented thereto.

On the 12th July, 1928, Nathu Mal brought the present suit to enforce his mortgage security. He joined as defendants the mortgagors and Raman Mal. Subsequently on Ram Das becoming insolvent the Official Receiver was added as a defendant, but he did not appear. Raman Mal was joined as a mortgagee holding a prior mortgage on the two shops at Lahore.

At the trial before the Senior Subordinate Judge, both Ram Das in his evidence, and Raman Mal by his counsel, contended that the sale to Raman Mal had been made with the express authority and consent of Nathu Mal. Ram Das testified that “ he was telling me to sell the Lahore property and pay him off.” The Judge disbelieved this story.

In the result the Judge made a preliminary decree for sale (dated the 22nd December, 1928), which fixed the 22nd February, 1929, as the date for redemption. It declared that the amount due to Nathu Mal for principal, interest and costs calculated up to that date was Rs.10,852 14a. 3p. and that such amount should carry interest at 6 per cent. per annum until realisation; that the amount due to Raman Mal on his prior mortgage was Rs.1,900 and on his subsequent mortgage was Rs.3,533 4a. 0p. calculated up to the 22nd February, 1929. There then followed the usual provisions contained in a preliminary decree, but framed so as to provide for the sale of the Lahore properties only in the event of the proceeds of sale of the Amritsar properties proving insufficient to answer the claims of Nathu Mal, and so as to preserve the priority of Raman Mal's prior mortgage. No redemption having taken place on or before the appointed day, a final decree for sale was passed on the 25th February, 1929.

In calculating the sum of Rs.10,852 14a. 3p. the Judge had made a deduction from the principal moneys alleged to be secured and had calculated interest only at 6 per cent. per annum.

Raman Mal appealed (No. 809 of 1929) from the preliminary decree, and asked by his memorandum of appeal to have a declaration added to the decree that he had a prior charge on the Lahore property to the extent of the money received by Nathu Mal out of the proceeds of the sale to Raman Mal, and the amount spent by Raman Mal on repairs and improvements to the property. He also appealed (No. 1024 of 1929) in similar terms from the final decree.

Nathu Mal appealed from both decrees, on two points, viz. (1) the reduction made by the Judge in the amount of principal secured by his mortgage and (2) the fixing of the rate of interest at 6 per cent. and not at 9 per cent. per annum.

The mortgagor Bal Kishan appealed on the ground that Nathu Mal's mortgage was not binding upon him.

The appeal of Bal Kishan was dismissed with costs, and no question now arises in respect of it.

The appeals of Nathu Mal failed except to the extent that the High Court decided that in respect of the period from the expiration of the first two years of the currency of the mortgage to the date fixed for redemption, interest should be calculated at 9 per cent. per annum, and the amount found due on the said date was increased to Rs.11,447 5a. 9p. accordingly. These matters are not now in dispute and disappear from the case.

The appeals of Raman Mal succeeded upon a point which apparently had not been argued or suggested before the Subordinate Judge, and which does not appear in Raman Mal's grounds of appeal, viz. that upon the true construction of Nathu Mal's mortgage deed, there was conferred upon the mortgagors or upon Ram Das a power which enabled them or him at any time to sell and transfer any part of the mortgaged property freed from the mortgage security, without either knowledge or consent on the part of the owner of the security.

Such a power, if conferred, is certainly a remarkable provision to find a place in a mortgage, for it would appear to be of a nature inconsistent with and indeed repugnant to the essential object of the deed which contains it. The essence of a transaction by way of loan on security, is that the lender, unwilling to rely solely on the personal liability of the borrower, requires in addition to be given a right in rem; and to insert in the same document a provision by which the borrower bestows the required right in rem, and a provision enabling the borrower to destroy it forthwith, is a proceeding difficult to contemplate as probable. To reach the conclusion that such is the intention and operation of a mortgage security, their Lordships would require to be confronted with language admitting of no possible doubt as to its meaning.

The Judges of the High Court have held that the words quoted earlier in this judgment are an express provision enabling Ram Das to pass a valid title free from the security, and that his failure to pay the whole purchase money to Nathu Mal is no concern of Raman Mal. But there is in fact no such express provision in the deed; all that the clause says in terms is that if Ram Das does sell a house he will pay over the entire proceeds to the mortgagee. Any further operation of the clause can only be extracted by inference. If any other inference is possible not inconsistent with or repugnant to the deed, it should be drawn in preference to an inference which may result in the destruction of the security.

In their Lordships' opinion it is impossible to say that the words used are sufficiently clear to justify the drawing of an inference productive of such jeopardy to the security; and not the less so in view of the fact that no provision is made for the mortgagee being informed either of an intention to sell or of the fact of a sale having taken place. He might never hear of it, or have the means of hearing of it, until years later when seeking to enforce his security, he would find it to be non-existent.

If it be desired to confer so drastic a power upon a mortgagor in the future, it will be necessary for those who frame the security to make express provision for that purpose in language free from all doubt or ambiguity.

As was pointed out by the Subordinate Judge a mortgagor is not entitled, unless authorised by the mortgage deed, to redeem the mortgaged property piecemeal. It appears to their Lordships that the more probable and reasonable inference to be drawn from the words used, is that the mortgagor is to have power to redeem part without redeeming the whole of the mortgaged property, a power consistent with the preservation of the security over the property sold until the mortgagee has concurred in the sale and received the purchase money.

The Judges of the High Court relied upon the decision in the case of *Asa Ram v. Kishan Chand* (A.I.R. 1930, Lahore 386) in support of their view. Their Lordships find it difficult to understand that decision upon the relevant point; for it would appear from the mortgage deed (clause 12) that there could be no release of property from the security until the mortgagee had received the purchase money and released the property sold. It is reasonably clear that in that case the provision enabling the mortgagor to sell, was merely a provision enabling him to redeem piecemeal, and not a provision enabling him to deprive the mortgagee of his security by means of a sale made by the mortgagor without the consent and concurrence of the mortgagee.

One other point must be mentioned. It was suggested on behalf of the appellant that the clause in question could have no reference to the Lahore shops because it referred to a house, and not to a shop. This narrow construction does not commend itself to their Lordships.

It follows from what has been said that this appeal should succeed, and accordingly a fresh date for redemption must be fixed (see *Jagannath Prosad Singh Chowdhury v. Surajmal Jalal* L.R. 54, Ind. App. 1, and *Satindra Nath Choudhury v. Jatindra Nath Choudhury* 62 L.R. Ind. App. 265). Their Lordships think that in the circumstances a date (hereinafter referred to as the new date for redemption) being two calendar months after receipt by the High Court of His Majesty's Order in Council will be a suitable date. The decree of the High Court must be discharged as also the final decree of the 25th February, 1929. The decree of the Subordinate Judge of the 22nd December, 1928, will be restored, but with the following variations:— (1) The new date for redemption must be substituted throughout the said decree for the 22nd February, 1929, and (2) the amount due to Nathu Mal for principal interest and costs up to the new date for redemption must be calculated upon the footing of Rs.11,447 5a. 9p. having been due on the 22nd February, 1929, and interest being chargeable up to the new date for redemption at the rate of 9 per cent. per annum, and the amount so due must be substituted throughout the said decree for the sum of Rs.10,852 14a. 3p.

Their Lordships will humbly advise His Majesty accordingly. As regards costs the respondent Raman Mal must pay the appellant's costs of this appeal and also his costs of Raman Mal's appeals Nos. 809 and 1024, and must repay such costs of those appeals as have already been paid to him by the appellant.

In the Privy Council

NATHU MAL

RAMAN MAL AND OTHERS

DELIVERED BY LORD RUSSELL
OF KILLOWEN.

Printed by His Majesty's Stationery Office Press,
Pocock Street, S.E.1.

1937