Privy Council Appeal No. 51 *of* 1937
Bengal Appeal No. 20 *of* 1935.

Ram Kinkar Banerjee, since deceased (now represented by Sreemati Saibalini Devi and others) - - - *Appellants*

v.

Satya Charan Srimani and others - - - - *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 29TH NOVEMBER, 1938

Present at the Hearing:

LORD ROMER
LORD PORTER
LORD SALVESEN
SIR LANCELOT SANDERSON
SIR FRANK MACKINNON

[*Delivered by* LORD PORTER]

In this case the original plaintiff has died since the institution of the suit and his interests are now represented by one Sreemati Saibalini Devi and others. Hereafter they will be referred to as the appellants.

There were originally a large number of defendants, but three only are made respondents to this appeal and their interests alone remain to be considered.

The others have either accepted the judgments given against them or have been dismissed from the case. The three remaining are Kripa Sankar Worah and Jatha Shankar Dosa, numbered 2 and 3 in the cases presented by the parties and Satya Charan Srimani, respondent No. 1 in those cases.

The facts may be briefly stated. The appellants are the successors in title to the grantees of a patta or lease for 999 years dated the 26th May, 1908, in respect of certain underground rights in the District of Burdwan. This lease contained provisions (*inter alia*) for (*a*) the payment by the grantees to the grantors of all cesses levied by the Government on account of the income of the colliery, (*b*) the payment of a minimum royalty, (*c*) the provision of certain quantities of coal.

The lease contained a clause giving the grantees liberty to alienate the property by making gifts, sales, sub-leases or any other kind of transfer to any respectable persons or company.

The grantees took advantage of this provision and on the 3rd June, 1908, transferred the property to one J. C. Martin. The terms of the document were similar to those of the lease of the 28th May, except for certain increases in the burdens imposed on the lessees. In form this grant, which is described as a " settlement," transfers the whole, and indeed more than the whole, of the original grantees' term to the sub-grantee and would under English law amount to an assignment of the head lease, but it is well established by Indian law and is common ground to both parties in the present case that such a transfer operates by way of sub-demise and not of assignment, see *Hunsraj* v. *Bejoy Lal Seal* (1929) 57 I.A. 110.

After various mesne assignments Martin's leasehold interest became vested in Ardhesir K. Patel, who is respondent No. 7 in the present appeal.

On the 18th May, 1923, Patel executed two mortgages of his leasehold interest (1) of an undivided moiety of the underground rights or colliery, (2) of the whole colliery but subject to the previous mortgage of the undivided moiety.

Both are in the form which a mortgage in England by assignment of the sub-term would take in that they contain (1) promises by the mortgagor to repay, (2) conveyances of the mortgaged property, (3) provisoes for reconveyance by the mortgagees to the mortgagor upon repayment of the mortgage money.

The consideration for the first mortgage is expressed to be a debt of Rs.49,500 and the mortgagor promises to pay this sum as to Rs.15,000 in the course of nine calendar months from the date of the mortgage and the balance by four equal yearly instalments of Rs.8,625 commencing from the 1st April, 1925, the last instalment falling due on the 1st April, 1928.

The consideration for the second mortgage is expressed to be Rs.50,500 repayable on the 18th May, 1928, with interest.

In the case of each mortgage monthly interest is stipulated for and the conveyance is stated to be subject to the terms of the leases and subject to the proviso for redemption contained in the mortgage itself; the mortgagor covenants to pay the charges and royalties due under the lease and to fulfil its other obligations, but the mortgagee is permitted to make these payments if not made by the mortgagor and to recover them from him and until payment to add them to the mortgage security; in case of default in payment of the moneys secured the mortgagee is empowered to enter into possession of the mortgaged property.

If the terms of the mortgages are fulfilled the mortgagors are entitled in each case to remain in possession of the mortgaged premises and carry on the colliery business thereon, but the mortgages differ in that in the case of the first it is provided that on default of payment of the money secured the mortgagee may enter into possession and work the collieries on giving three months' notice in writing, whereas in the second, though he may enter on non-payment of the principal sum on the 18th May, 1928, yet if the

mortgagor duly pays the interest the mortgagee undertakes not to recall the mortgage money until the 18th May, 1933, unless default is made in payment of interest for 37 months.

The first mortgage was duly transferred to the respondents Worah and Dosa on the 17th April, 1928, and the respondent Srimani, when this suit was instituted, was still the mortgagee under the second mortgage.

None of the mortgagees ever entered into possession, but the rent reserved by the sub-lease to J. C. Martin having fallen into arrear and the covenants and conditions remaining unperformed the appellants on the 15th July, 1929, instituted the present suit in the Court of the Subordinate Judge of Asansol, claiming against all the defendants the performance of the terms of the sub-lease at any rate during such period as they had an interest in it.

To that suit the representatives of the sub-lessees and various assignees were made defendants and judgment appears to have been given for the full amount awarded against all except two defendants, one of whom was interested under the terms of a deed of gift made by Patel on the 1st December, 1925, and the other of whom was the manager of the person so interested. Another defendant who had been appointed receiver by the Court in a mortgage action taken by the mortgagees against the mortgagor also subsequent to the period for which rent was claimed has been dismissed from the suit by the Appellate Court.

No question now arises as to these parties. The only appellants are the two sets of mortgagees whom the Subordinate Judge held liable upon the principle applied in English law ever since the decision of *Williams* v. *Bosanquet* (1819) 1 Brod. & Bing. 238. The grounds of that decision were that if mortgagees of a term become assignees of the mortgaged property under the terms of the mortgage deed they are liable unless and until they re-assign the property for the rent reserved by and upon the covenants contained in the sub-lease because privity of estate has been established between them and the lessor by reason of the assignment. The Court did not decide in the present case that this liability existed in India in all cases but only in those in which the form there known as an "English mortgage" is used. The mortgages in question he held to be English mortgages.

The Appellate Court reversed this judgment on the ground that the mortgages in question were not English mortgages and that even if they were the whole of the right, title and interest of the mortgagor in the property did not pass to the mortgagees by virtue of their terms.

From that judgment the appellants appeal to His Majesty in Council.

By English law and by Indian law an assignee of a lease is liable by privity of estate for all the burdens of the lease, burdens which are imposed upon him by the mere assignment whether he enters into possession or not. See *Kunhanujan* v. *Anjelu* (1889) 17 Mad. 296, and *Monica* v. *Subraya Hebbara* (1907) 30 Mad. 410.

The ground upon which he is held liable is that the whole of the assignor's interest has passed to him by the deed of assignment and that the assignor having no longer any interest cannot be liable by privity of estate though he still remains liable by contract if he was party to the original lease.

Under the English system of law *Williams* v. *Bosanquet* (*ubi supra*) decided that, in cases where the ordinary form of mortgage, in use in this country before the passing of the Law of Property Act of 1925 is adopted, the whole of the lessee's interest passes to his mortgagee notwithstanding that an equity of redemption remains in the mortgagor.

If this were true also in India the same result would follow. Their Lordships therefore have to determine whether under the Indian system of law the whole interest of a mortgagor of a lease does in any, and, if so, in what, circumstances pass to his mortgagee.

Until 1925 the usual form of mortgage in England, whether of a fee simple or of a lease was the transfer by assignment of the mortgagor's interest in the property with a proviso for reassignment upon payment of the mortgage money by a particular date. After that date had passed, the mortgagor's rights at law had determined and the mortgagee was in law the absolute owner of the property. But in equity the mortgagor still retained a right to redeem and upon payment of the debt and interest to have the property reconveyed to him. This right he retained unless and until by judgment for foreclosure, or (possibly) by the operation of the Statute of Limitations, the character of creditor was changed for that of owner, or until the interest of the mortgagee was destroyed by sale either under the process of the Courts or of a power contained in the mortgage itself. This right was an equitable right and under English law did not prevent the whole legal interest of the mortgagor passing to the mortgagee despite his retention of the equity of redemption. The whole legal estate passed but nevertheless the right which he retained though equitable only was an estate in the land, and was not merely a personal contract on the part of the transferor.

Up to the time of the passing of the Transfer of Property Act the rights of mortgagors and mortgagees of land in India were subject to much controversy, though in general the law of England, subject to such modification as justice, equity and good conscience required was recognised as the law of India also. But whether the English rules of equity were applicable to such cases was not certain. Since the passing of that Act, however, the distinction drawn in England between law and equity in such cases does not exist in India.

As Sir George Rankin says in *Bengal National Bank, Ltd.* v. *Janaki* (1927) 54 Cal. 813, at p. 822, "The Transfer of Property Act has left no room for such a distinction."

The Indian mortgagor, however, retains some rights though the English rules of equity do not apply. He retains a right to a reconveyance of the land and a right to transfer such right by way of sale or second mortgage (see sections 81,

82, 91 and 94) and this right in India is a legal right. When therefore the mortgagor transfers his property by way of mortgage can he be said to transfer his whole interest? Russell J., in *Vithal Narayan's case* (1905) 29 Bom. 391, answers the question thus:—"In India there is no equity of redemption in the lessee (mortgagor) and there being no distinction between his legal and equitable estate, his 'whole estate' is not transferred by the mortgage." The observation is general though in the particular case Russell J. was dealing with a mortgage in a form widely different from that employed in England.

Apart from the two cases referred to above, the Indian authorities recognise the principle that the distinction between law and equity has no place in Indian law. For this proposition reference may be made to two of the cases quoted by the appellants in argument, viz.:—*Thethalan* v. *The Eralpad Rajah* (1917) 40 Mad. 1111 at p. 1114, and *Falakrishna Pal* v. *Jagannath Marwari* (1932) 59 Cal. 1314.

The same view is commonly accepted in the Indian text books (see Ghose's Law of Mortgage in India, (5th ed., 1922), p. 335, and Mulla's Transfer of Property Act, (2nd ed., 1936), p. 345) and was indeed adopted by the appellants in argument in the present case. Their contention was that the Act was a self-contained code by which alone the rights of mortgagor and mortgagee were to be ascertained and under which statutory and not equitable rights were brought into existence.

Their Lordships agree with this contention and accordingly turn to a consideration of those sections of the Act which deal with mortgages. Section 58 (*a*) of the Act enacts that a mortgage is a transfer of an interest in specific immoveable property. Upon this definition there follows in the Act as in force at the material date an enumeration of four classes of mortgage, viz., (1) simple mortgage, (2) mortgage by conditional sale, (3) usufructuary mortgage, (4) English mortgage. Two other classes, equitable mortgage and anomalous mortgage, are recognized and dealt with in sections 59 and 98 respectively. Of these six it is contended that the English mortgage by its terms amounts to, and the anomalous mortgage by its terms may amount to a transfer of the whole interest of the mortgagor, and therefore where the subject matter is a lease, create privity of estate between the lessor and the mortgagee of the lease.

No doubt in English law they would do so, but it does not follow that under a system in which equity has no place the same wording which would transfer the whole interest of the mortgagor under the former law would do so under the latter. The outlook is different. By Indian law the interest which remains in the mortgagor is a legal interest and its retention may therefore prevent the whole of the mortgagor's interest from passing to the mortgagee—a result which would not follow if an equitable interest only were retained. The Act itself contains some suggestions to this effect. Section 54, which deals with *Sale,* speaks of a sale as a transfer of ownership as opposed to the transfer of

interest spoken of in section 58 (*a*) in the case of a mortgage, and though an interest may be absolute the word, particularly when used in opposition to ownership, is more appropriate to a limited right.

To this argument the appellants reply that whatever may be the case with other types of mortgage, section 58 (*e*) in defining the term "English mortgage" speaks of an absolute transfer of the mortgaged property to the mortgagee. Its terms are, "Where the mortgagor binds himself to repay the mortgage money on a certain date and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will retransfer it to the mortgagor upon payment of the mortgage money as agreed, the transaction is called an English mortgage." By such a mortgage they say the mortgagor parts with his whole interest subject only to his statutory right of redemption given by section 60 of the Act. The wording of section 58 (*e*) undoubtedly gives rise to some difficulty, but before considering the construction to be put upon it, the soundness of the appellants' general contention must be considered.

Under the English practice adopted before 1925 no difficulty arose; the mortgagor parted with his whole legal estate though he retained an equitable interest in the land itself. The mortgagee to whom the legal interest was transferred by the mortgage deed was accordingly held to have been brought by that transfer into direct relationship with the lessor by privity of estate and to be liable for the rent.

But under the Indian Act no equitable rights exist and therefore unless the mortgagor retains some legal interest in the land he has merely a contractual right to have it reconveyed. If he retains some legal interest it is difficult to say that he has parted with his whole interest. On the other hand, there are strong reasons against holding that he retains merely a contractual right against the mortgagee. If the case arose in England it would be possible to say that the contract for reconveyance gave the mortgagor an equitable interest in the land, but this argument is untenable in India. In the first place, as has been pointed out, equitable estates do not exist in that country, and in the second, under the provisions of section 54 of the Transfer of Property Act a contract for the sale of immoveable property does not create any interest in or charge upon the land sold. Having this provision in view it is difficult to see how a personal contract to reconvey can create any interest in the land itself.

But to regard the mortgagor's right of redemption as being merely contractual and as creating no interest in the land would make it impossible for him to assign his right of redemption or to create a second mortgage so as to bind the land.

Such a state of things is, of course, theoretically possible, but it is inconsistent with the provisions of the Act (which in sections 81, 82, 91 and 94 recognises second mortgages) and with the possibility, well established in India, of transferring the right of redemption to a purchaser.

Bearing these considerations in mind it remains to consider the effect of the wording of section 58 (*e*) of the Act. That section speaks of the mortgagor transferring the "mortgaged property *absolutely* to the mortgagee." In using those words does it mean that no interest or no legal interest in the property remains in the mortgagor? Their Lordships cannot think so. If the sub-section stopped at the word "mortgagee" it might be necessary to put this construction upon it, but it does not stop there: it adds the proviso that the mortgagee "will retransfer" the property "upon payment of the mortgage money as agreed." Their Lordships think that with this addition the sub-section upon its true construction does not declare "an English mortgage" to be an absolute transfer of the property. It declares only that such a mortgage would be absolute were it not for the proviso for retransfer.

It does not determine what legal effect follows from the use of a particular form of words; it merely prescribes the form of words necessary to constitute what is known in India as an English mortgage.

Section 58 (*e*) deals with form not substance. The substantial rights are dealt with in sections 58 (*a*) and 60. Whatever form is used nothing more than an interest is transferred and that interest is subject to the right of redemption.

As has been stated, in the case of the first mortgage the contractual date of payment was the 18th May, 1928, and that date had passed before this action was begun. In the case of the second mortgage the mortgagee undertook not to recall the mortgage money until the 18th May, 1933, if the interest were duly paid. The distinction between a case where the date of payment has elapsed and that in which it has not yet been reached was alluded to in *Williams* v. *Bosanquet* (*ubi supra*) and it was pointed out that in the former case the condition of repayment being unfulfilled the transfer was unquestionably an absolute transfer. The Court, however, considered that the transfer would have been absolute even though the date of payment had not been reached.

In the present case, as in that, their Lordships think that no distinction in principle exists.

In England the mortgagor has an equitable interest in the property both before and after that date has elapsed: before, because he has a contractual right to have the property reconveyed: after, because in equity time is not of the essence of the transaction. In each case he has an equitable estate though in the former he has not yet an equity of redemption. See *Kreglinger* v. *New Patagonia Meat, &c., Co.* [1914] A.C. 25 per Lord Parker, at p. 49. In India the same distinction exists between the position before and after the date of payment.

Before that date the mortgagor has an interest in the land which for the reasons given above is legal and not equitable. After that date he has the legal right of redemption given him by section 60 of the statute.

In each case he retains a legal interest in the property.

Their Lordships therefore think that in India a mortgagor when he assigns his interest under a lease to a mortgagee does not under any of the forms specified in section 58 of the Act transfer an absolute interest within the principle established in England by the case of *Williams* v. *Bosanquet* (*ubi supra*) and consequently the mortgagee is not liable by privity of estate for the burdens of the lease.

In the past there has been a conflict of authority in India on the question. *Falakrishna Pal* v. *Jagannath Marwari* (*ubi supra*) may be instanced as adopting the arguments which commend themselves to their Lordships. *Kannye Loll Sett* v. *Nistoriny* (1884) 10 Cal. 443, and *Bank of Upper India* v. *Adm. Gen. of Bengal* (1917) 45 Cal, 653, suggest a different point of view. None of them decides the matter. *Bengal National Bank* v. *Janaki* (*ubi supra*) is a direct decision that the mortgagee is liable, certainly in the case of an "English mortgage," possibly also in the case of an "anomalous mortgage." But that case recognises the difficulty created by the difference of outlook between English and Indian law, and having regard to that difference their Lordships feel themselves unable to follow that decision.

In coming to this conclusion their Lordships think it unnecessary to discuss or determine what the rights of the parties would have been had the mortgagees entered into possession of the properties or to determine whether the mortgages granted to the respondents or to their predecessors in title were English mortgages or not.

In their view the mortgage of a lease in any of the six forms referred to above is not an absolute assignment under Indian law and does not create privity of estate between the lessor and the mortgagee.

It was urged in argument before their Lordships on behalf of the respondents that the wording of section 108 (*j*) of the Transfer of Property Act furnished support for the view that an assignment by way of mortgage was not absolute. That sub-section enacts that "the lessee may transfer absolutely or by way of mortgage or sub-lease the whole or any part of his interest in the property." This wording it was said makes a distinction between absolute transfers and transfer by way of mortgage and so shows that the Act regards the latter as not being absolute.

Their Lordships, however, are not prepared to hold that the three classes of transfer are mutually exclusive. They are not necessarily so. For instance, a mortgage of a lease may be created by way of sub-lease.

But apart from this argument their Lordships are, as they have indicated, of opinion that the respondents are in the right.

They will humbly advise His Majesty that the appeal be dismissed with costs, and, as they think that the respondents were entitled to be separately represented, that the appellants should pay the costs of each of the two sets of mortgagees.

(13915—3A) Wt. 8168—30 200 12/38 P. St. G. 338

In the Privy Council

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