
(1936) 11 BOM CK 0019
In the Bombay High Court
Case No : First Appeal No. 195 of 1933

Chunilal Bulakhidas Patel

APPELLANT

Vs

Abdul Karim Shaikh Subhrati

RESPONDENT

Date of Decision : 26-11-1936

Acts Referred:

Transfer of Property Act, 1882 — Section 76, 76(b)

Citation : AIR 1937 Bom 483 : (1937) 39 BOMLR 795

Hon'ble Judges : Wassoodew, J;Broomfield, J

Bench : Division Bench

Judgement

Wassoodew, J.—This appeal arises from an action by a mortgagee to recover the mortgage money in the amount of Rs. 16,500 due on a mortgage of certain leasehold estate situated outside Sarangpur Darwaja in the Sheher-kothada sub-district of Ahmedabad. The mortgage-deed was executed on March 5, 1927, by defendants Nos. 1, 4 and 5 of whom defendant No. 1 represented his own interest and that of his minor sons, defendants Nos. 2 and 3. Besides the said mortgagors the other parties to the suit were the heirs of the deceased surety, defendants Nos. 5 to 8, and the subsequent incumbrancer, defendant No. 9, who happened also to be the heir of the lessor. The principal advanced on the mortgage was Rs. 12,999 and the rate of interest agreed upon was thirteen and a half per cent, payable monthly. The deed provided that on failure to recover the interest regularly compound interest was to be charged with monthly rests. In accordance with the terms of the deed the mortgagee was to be placed in possession of the building consisting of thirty-two rooms at that time. The security was, however, expressly intended to cover twelve additional rooms which the mortgagors intended to construct and for which part of the debt was borrowed under the mortgage. The mortgagee in his turn agreed to apply the profits and rents of the property towards the payment of interest in the first instance and the balance towards the principal debt.

2. Contemporaneously with the registration of the deed on March 24, 1927, two

of the mortgagors, defendants Nos. 1 and 4, who were allowed to continue in occupation of part of the premises along with the other mortgagors, entered into an agreement with the mortgagee whereunder they undertook the collection of rents and to account for the same to the plaintiff. Soon, after the registration of the deed the tenants of the property attorned to the mortgagee by executing rent-notes in his favour. For the charges of collection the mortgagors were remunerated at the rate of Rs. 10 per month. The effect of that, agreement was that the duty of managing the estate and dealing with the tenants was not taken out of the hands of the principal mortgagors.

3. The mortgagee alleged that the mortgagors who were thus entrusted with the work of collection committed breach of their agreement by failing to pay regularly the rent realized and account for the same to the plaintiff, that they did not pay him more than Rs. 146 in any one month, and that therefore the mortgagee was obliged to give them notice on July 12, 1929, not to make further recoveries or to enter on the premises. Having received no satisfactory reply, the mortgagee instituted the suit on August 16, 1930.

4. According to the plaintiff the total sum paid to him during the three years before the suit was Rs. 3,683-8-0. The balance has, therefore, been claimed in this suit. It must be noted that upon the application of the mortgagee the trial Court appointed a receiver and the properties are now in his charge.

5. The mortgagee's claim was met by various pleas put forward by the mortgagors such as that the full consideration mentioned in the deed was not received, that the suit was premature, that the agreement to collect rent was obtained by misrepresentation and that it was not acted upon, that the mortgagors had not collected any rent from the tenants in possession and that the twelve additional rooms constructed after the execution of the document were not intended to form part of the security. The heirs of the surety in their turn supported the mortgagors generally in their defence and maintained that the plaintiff was liable to account for all the monies recovered by the mortgagors on the footing that the latter were his agents. The holder of the subsequent encumbrance of the twelve rooms erected after the mortgage, who has attested the mortgage-deed and whose prior encumbrance was paid off out of the advance received from the plaintiff, denied knowledge of the transaction and claimed priority for his amount maintaining that the subject-matter of his charge was not covered by the plaintiff's security.

6. The principal defences of the parties were disallowed by the learned trial Judge, but the material plea which prevailed with him was that the mortgagee was guilty of wilful default inasmuch as he, being a mortgagee in possession, the mortgagors being no better than his agents for collection, was liable to account for all the rents that were or could be recovered from the tenants and not merely for the rents which were paid to him by the mortgagors. On the footing of the mortgagee's wilful default accounts were ordered to be taken of the gross rent realisable from the premises that existed when the mortgage was executed as

well as the twelve additional rooms subsequently constructed and which, according to the defendants themselves, were never delivered into the possession of the mortgagee, and a decree for Rs. 8,214-7-3 with interest on the amount found due and costs on the amount due at the date of the suit was passed against the mortgagors and the surety personally and against the mortgaged property. The subsequent incumbrancer, defendant No. 9, was also held liable personally for that amount and the priority claimed for his advance was disallowed. Against that decree the mortgagee has appealed. The heirs of the surety and the subsequent incumbrancer have acquiesced in it.

7. The only question of substance is whether the mortgagee in the circumstances is accountable for the profits of the mortgaged property on the footing of wilful default.

8. In the consideration of that question it is necessary to state our conclusions on the evidence in regard to the contentions of the respective parties relating to the possession of the property. There can be no doubt upon the record that the mortgagee, although entitled to possession by virtue of the terms of the deed, has allowed the mortgagors (defendants Nos. 1 and 4) to occupy a portion of the premises and to collect rent for him as his servants or agents. That is the effect of the agreement?exhibit 62. The defences of defendants Nos. 1 and 4, which are mutually inconsistent, are clearly disingenuous. Neither of them has honestly admitted that he received rents for the plaintiff in terms of the agreement. The learned Counsel for defendant No. 1 did not attempt to sustain his plea of misrepresentation as nullifying the agreement. In his examination defendant No. 1 was constrained to admit that he collected rent on behalf of the plaintiff, passed receipts and handed over the collections to the latter. Defendant No. 4 denied that he dealt with the tenants or recovered rents. But he did not enter the witness-box to substantiate his written defence. It is important to note that in regard to the amount actually collected and handed over to the plaintiff the latter's statement has not been contradicted. The plaintiff says that he received Rs. 3,683-8-0 from defendant No. 1 during the three years prior to the suit and we do not see any reason to discredit that statement. It is supported by the diaries of the plaintiff which appear to be regularly written and in which balances have been struck from day to day. The plaintiff is corroborated by the acknowledgments signed by defendant No. 1 in November, 1928 (exhibit 146) confirming the plaintiff's statement in regard to the actual amount handed over to him at the end of the second year. That evidence of actual receipts from the property mortgaged is all that is available from the plaintiff's side and it is reasonable to suppose that no other evidence with regard to the details of recoveries could be procured by him having regard to the exclusive management of the premises by defendants Nos. 1 and 4.

9. Comment has been made on the mortgagee's failure to maintain proper accounts notwithstanding the fact that the mortgagors themselves agreed to be in management. It is pointed out that under the provisions of Section 76 of the

Transfer of Property Act the mortgagee's account must show not only what the mortgagee has actually realized from his agents but also from what portions of the mortgaged property, in what terms or periods, with a statement showing necessary deductions for vacancies, and the net profits available on actual realizations in liquidation of the mortgage debt. There could have been considerable force in that suggestion if we were dealing with a mortgagee in actual possession independently of the mortgagors' intercession. There were in all about thirty-two tenements occupied by tenants through whom rent-notes were procured by the mortgagors in favour of the plaintiff for a period of one month (vide exhibits 65 to 95). In the view we take of the evidence the rents were directly recovered by defendants Nos. 1 and 4 who were left to deal with the tenants. In ordinary circumstances, therefore, the persons best cognizant of the state of recoveries and vacancies in respect to those tenements would be the mortgagors themselves. There is no evidence tendered that all the rents were recovered from the occupants of the rooms. Defendant No. 1 has admitted that there were some changes in some tenants, but there was no suggestion that the plaintiff had a hand in replacing them. It is, therefore, difficult to conceive how the plaintiff could give any account regarding the number of occupants of the premises, the rent actually realized and what loss was suffered on account of vacancies. As I have stated above, that was all within the special knowledge of defendants Nos. 1 and 4, and inasmuch as defendant No. 1 has given evasive replies and defendant No. 4 has abstained from supporting his case, there is every justification for drawing an adverse inference against them. It is, in our opinion, unreasonable to assume, as the lower Court has done, that all the rooms continued to be occupied or that the tenants regularly paid the rents. The irresistible inference from all the facts and circumstances is that in all probability defendants Nos. 1 and 4 recovered the rents and paid taxes and portion of the lessors' dues. There is no direct or circumstantial proof that the plaintiff had a hand in the actual recoveries from the tenants. Although technically the plaintiff was the mortgagee in possession and could be said to have constructively received possession from his mortgagors, he could not and did not interfere with the management till November, 1929. That is our conclusion in regard to the position of the plaintiff relating to the thirty-two rooms which existed at the date of the mortgage.

10. Our finding of fact upon the evidence with regard to the twelve rooms subsequently constructed is that the plaintiff was never in possession either directly or through defendants Nos. 1 and 4. It is neither suggested nor proved that they were delivered to the plaintiff. The contents of the plaint do not necessarily imply that the plaintiff took possession of those rooms. The reference in that respect is undoubtedly in connection with the contention that those twelve rooms were not part of the security under the possessory mortgage. The plaintiff's case could reasonably be supported upon the express terms of the deed and under the provisions of Section 70 of the Transfer of Property Act. It does not follow that because of that reference in the plaint to the defendants'

contention the mortgagee actually received possession. It is to be noted that the agreement of defendants Nos. 1 and 4 makes no reference to the collection of rent of those premises and there is no reason to infer that they were authorized to collect rent by the plaintiff. The written defence and the execution of the subsequent possessory mortgage necessarily militate against the assumption of the mortgagee's possession. It is, therefore, curious to find that the lower Court by its order of March 24, 1933 (vide exhibit 168) made the plaintiff liable to account for the gross rent of those rooms also.

11. As I have observed, upon a strictly technical view, the mortgagee in possession is liable to account and that liability in some respects might be regarded as absolute. But before that liability can be enforced in favour of the mortgagors it must be proved that the mortgagee had received possession by virtue of the agreement. That is a matter of proof and not presumption. In *Soar v. Dalby* (1852) 15 Beav. 156 the Master of the Rolls expressed the opinion that the mortgagee was only to be charged in respect of that part of which he had taken possession. Obviously therefore the order of the lower Court in regard to those twelve rooms cannot be supported.

12. The main dispute is in regard to the basis upon which the mortgagee should be made to account to the mortgagors for the profits of the thirty-two rooms mortgaged. It has been well recognized that the account usually directed against the mortgagee in possession is of what he has, or without wilful default, might have received from the time of his taking possession. u/s 76(b) of the Transfer of Property Act he must use his best endeavours to collect rents and profits. Prima facie the plaintiff, when he took the rent-notes from his tenants, technically rendered himself liable to account for the rents which he had contracted to receive and it cannot be denied that the law required him to be diligent in realizing the rents from them in order that the burden of the debt may be reduced. His liability in the first instance extends in favour of those interested in the equity of redemption. It has been pointed out in numerous decisions of our Courts that under that liability if a mortgagee employs an agent for collection of rents he must account for all the rents which were or could be realized by that agent. But the burden of proving that he made the most of the mortgaged property while in possession does not rest on the mortgagee as it is for the mortgagor to establish a case of wilful default (see the cases cited in the footnote on the subject in Ghose's Law of Mortgage, 4th edn., p. 532).

13. The question, therefore, is whether the mortgagee, having regard to the fact that the mortgagors have succeeded in keeping the mortgagee out of the management of the property, by themselves remaining in possession of the premises either under an attornment clause or under an agreement such as we have here, under which the mortgagors are allowed to deal with the tenants, could be made liable to account as an ordinary mortgagee in possession who has been managing the estate through his private agents. There have been cases where the mortgagor is allowed to remain as a tenant of the, mortgagee under

what is called an attornment clause, and it has been held that in" regard to such occupation the mortgagee does not stand in the position of a mortgagee in possession?see Ex parte Harrison : In re Betts (1881) 18 Ch D. 127. The position" is thus summed up under the heading "Attornment by Mortgagor" in Fisher and Lightwood"s Law of Mortgage, 7th edn., p. 721 :?

It has been said that the attornment of the mortgagor, if in actual occupation, as tenant to the mortgagee?although only by virtue of an attornment clause in the mortgage-deed?makes the mortgagee liable as mortgagee in possession to subsequent incumbrancers; but that view has not been accepted, and the ordinary relation of mortgagor and mortgagee continues. In any case the mortgagee is not liable on this ground to account as mortgagee in possession to the mortgagor.

14. The position of defendants Nos. 1 and 4 is analogous to that of mortgagors occupying, under an attornment clause, a part of the premises for which they are admittedly liable to pay rent. The mortgagors also offered and undertook to make recoveries. There was a representation by the surety that having regard to the recalcitrancy of the tenants the rents could not be recovered without employing the mortgagors for the purpose. They either failed to make recoveries, or after having made the same refused to account for them to the mortgagee. And yet it is claimed on their behalf that accounts should be rendered by the mortgagee on the footing that what they (the mortgagors) did recover or might have recovered could properly have been recovered by the mortgagee if he were diligent. It is suggested, however, that at any rate the conduct of defendants Nos. 1 and 4 ought not to prejudice the interests of defendants Nos. 2, 3 and 5 who were not parties to the arrangement and who did not participate in the alleged misappropriation of the co-mortgagors. Even the liability of a mortgagee in possession, although absolute in the abstract, might be reduced or qualified by the obstruction of the mortgagor to make the best use of the property. In *Hughes v. Williams* (1806) 12 Ves. 493. it was pointed out that if the mortgagor knows that his estate is underlet, he ought to give notice to the mortgagee and ? afford his advice and aid" for the purpose of making the estate as productive as possible. In other words, the mortgagor cannot keep quiet and seek afterwards by way of "penal enquiry" to charge the mortgagee with the effect of his own negligence. A fortiori the mortgagor who had caused obstruction to the mortgagee"s dealing with the property, as the reply to the notice shows, cannot seek for penal enquiry and charge the mortgagee with wilful default.

15. The mortgagee is not always chargeable with the gross estimated rent of the property (see *Banarsi Prasad v. Ram Narain* ILR (1903) All. 287 P.C.) According to the rent-notes the total rent realisable was Rs. 232 per month, but there is no evidence that the whole amount could be realized. It is true that the plaintiff charged the defendants with misappropriation of part of the rents and could have taken steps to dismiss them. But having regard to the circumstances and the representation made to him by the surety, who was interested in the proper

recoveries of the plaintiff's property, those recoveries would be impossible without the mortgagor's co-operation. It was, therefore, a matter of conjecture and uncertainty whether the dismissal would have entailed improvement in the position. The liability of the mortgagee for the omission to take drastic measures against the mortgagor must be limited by the circumstances of the case and he cannot be required to account for more than what he has received in the absence of proof that but for his gross default or mismanagement or fraud he might have received the full rent.

16. In *Juggeewun-das Keeka Shah v. Ramdas Brijbookun-dasi* (1841) 2 M.I.A. 487. the mortgagee under his agreement was entitled to recover rents through a mehta appointed by the mortgagee but paid by the mortgagor. The mehta had allowed the mortgagor to receive the rent directly. On the question whether the mortgagee was liable on the footing of wilful default in respect of the sum paid to the mortgagor, their Lordships observed as follows (p. 500) :?

...the question will be, in what way the mortgagee's rights are affected by this conduct, and that will depend first upon the construction of the instrument itself. If this is a binding contract, binding between him and the mortgagors, binding him to apply the rents and profits to the payment of the debt, he might be considered as having forfeited his right to payment in consequence of having allowed the mortgagors themselves to take possession of the rents and profits during some of the years during which his Mehta was in possession. But their Lordships are of opinion that that is not the true construction of the deed, but that it is merely a power to satisfy himself, just as an English mortgagee may, by taking possession of the rents and profits of the estate; and if an EngMi mortgagee chooses to forego the benefit of receiving the rents and profits, and permits the mortgagor to take them, it would have no effect as between him and the mortgagor; he would have a full right to recover his debt by reason of the mortgage. The only effect would be when some subsequent incumbrancer came in, and he had notice of that claim.

That is consistent with *Ex parte Harrison* : In *re Betts*, The Court will not penalise a mortgagee if the mortgagor has contributed effectively and successfully towards the mortgagee's failure to discharge his duty as a mortgagee in possession.

17. The cases cited before us such as *Saeed Ahmed Khan, Saiyed v. Raja Bar-khcmdi Mahesh Pratab Narain Singh* ILR (1932) Luck. 40. and *Mt. Ratan Dei Kunwar Vs. Sher Singh and Others*, are distinguishable on facts. It is possible to conceive of cases where the mortgagee without any special agreement has connived at the management of the mortgagor. In that case it is reasonable to make him liable.

18. It was observed in *Noyes v. Pollock* (1886) 32 Ch. D. 53. that the fact that the mortgagees were in receipt of the rents and profits of the mortgaged estate did not necessarily make them chargeable as mortgagees in possession; and that

the question whether they were mortgagees in possession depended upon whether they had taken out of the mortgagor's hands the power and duty of managing the estate and dealing with the tenants.

19. In the view we take of the evidence the burden of proof of wilful default has not been satisfactorily discharged by the mortgagors. There is no doubt, therefore, that the mortgagee is accountable to defendants Nos. 1 and 4 for what he has actually received from them.

20. The case of the co-mortgagors (defendants Nos. 2, 3 and 5) does not, in my opinion, stand on a different footing. It is sufficient to say that defendant No. 1 represented his two minor sons, defendants Nos. 2 and 3, in the suit and they submitted a common defence. The only lessees named in the lease of this estate are defendants Nos. 1 and 4. Therefore, the interests, if any, of defendants Nos. 2 and 3 would be derived through their father defendant No. 1 and their brother defendant No. 4 who were the principal persons to bring about this transaction. It is also necessary to note that defendant No. 1 has claimed the property as his own. Having regard to that relationship of the minors and the nature of their interest, it is not unreasonable to suppose that the managing co-mortgagors represented them also. Therefore there is no reason to extend or to enlarge the liability of the mortgagee in their favour.

21. It has been contended on behalf of the heirs of the surety that at least so far as he is concerned the liability should be enlarged and the mortgagee made strictly accountable on the principle of wilful default. The learned Counsel went to the length of saying that there was variance of the contract without the surety's consent which ipso facto discharged the latter. There is no plea of discharge in the written defence and no issue directed to the point. The surety has been held liable in the Court below on the footing that he was bound by the contract. Against that finding no appeal has been presented and no cross-objections urged. It is therefore difficult to say how the question of the surety's discharge can be raised for the first time in appeal. But apart from that difficulty, it is clear that there is no variance such as the one urged. It is necessary in the consideration of the argument to refer to the precise terms of the mortgage-deed containing the indemnity bond to protect the interests of the mortgagee. After the description of the property the deed recites the mortgagee's undertaking to apply the income towards the payment of annual interest and the balance, if any, towards the principal. Then follows the undermentioned clause in the deed :?

In case the rent in respect of the rooms mortgaged with possession be realized or not realized, or if the rent is realized but the tenants fail to pay the same or if the rooms remain vacant, in all these matters we and our heirs and representatives are to be responsible for the same but so far as you are concerned, you are to give credit to us for as much rent as you may receive.

22. Assuming so far as the mortgagors are concerned that the mortgagee could not contract out of his statutory liability by virtue of that clause, that clause

would govern the contract of indemnity. Its existence was present to the mind of the surety when the deed was executed. Therefore, the surety cannot contend that the mortgagee under the deed was not accountable only for the net rents realized by him. The surety, upon the evidence which we accept, brought about the agreement with the mortgagee and he cannot be heard to say that because the mortgagee had suffered the mortgagors to collect the rents and to remain in occupation, there was a variance of the contract which released him from liability. It is to be noted that the surety himself had employed defendant No. 1 to collect his rent and according to him he was the best person to do so. It is therefore strange to notice that he should complain against the plaintiff's action. Nor can it be urged that the surety should be discharged because the arrangement between the plaintiff and the mortgagors affected the fund upon which the surety had a right to rely. Upon the facts it is possible to hold that there was no deterioration of the mortgaged property by any wilful neglect on the part of the mortgagee. It is possible to conceive that when the mortgagors offered Rs. 146 out of the gross rental of Rs. 232 per month the mortgagee believed that the balance would possibly be utilised in some lawful manner to pay taxes or rent. I have already dealt with the difficulty of maintaining any fuller accounts than those adduced and I think in the circumstances the plaintiff could not be expected to do anything better. There is no equity in favour of the surety.

23. Then there remains the question of the subsequent incumbrancer. It may be noted that although no relief was claimed against him, the lower Court has passed a personal decree against him as well as against defendants Nos. 1 to 7. No appeal has been preferred against that part of the decree. The learned Counsel for the appellant has candidly stated that he does not propose to execute the decree against defendant No. 9. The priority claimed by in the lower Court has been disallowed. All that is urged on his behalf is that inasmuch as the plaintiff has neglected to recover the rents through the mortgagors, he cannot fall back on the entire security to the prejudice of the second incumbrancer. As I have already observed that encumbrance relates to the twelve rooms subsequently erected and inasmuch as there was no delivery of possession to the mortgagee, there was no question of the latter incurring a liability on the footing of wilful default to the second incumbrancer. It is suggested that, when directing the sale of the property for satisfying the debt, the subject-matter of the second encumbrance should not be sold until and unless the other portion of the security has been found insufficient to meet the claim awarded to the plaintiff. The lower Court's order as it stands makes provision for such a contingency. If it is practicable and feasible to sell the other part of the property separately, the lower Court will be able to protect the interests of the subsequent incumbrancer. We, therefore, propose to make no alteration in the order of the lower Court in that respect.

24. As a result of our finding the lower Court's decree will be modified in the following manner :?that in lieu of the amount found due by the lower Court another shall be substituted after taking a fresh account in which the plaintiff

shall be debited with the actual amount of the rent realized by him from the property mortgaged according to his statement, it being understood that the account shall not be re-opened except where necessary in consequence of this order in order to make an adjustment of interest upon the amount of actual realization of rent. The question of the mortgagee's liability for being debited with any amount other than that which has already been debited to him besides rent in the accounts taken in the lower Court, shall not be raised upon this remand. It has been suggested to us that the account best be taken in the trial Court. We, therefore, remand this case to lower Court for a finding on the following issue :?

25. What amount is due to the plaintiff on the mortgage on the basis of the above judgment and direction?

26. The finding on the above issue shall be returned to us within one month after the record is received in the lower Court.

27. On the question of costs we are satisfied, after hearing arguments, that there is no reason to restrict the plaintiff's claim for costs on the amount due at the date of the suit. He shall get his costs on the amount awarded to him. A formal order in that respect will be passed¹ when the finding is received.

Broomfield, J.

28. I agree.