

(1936) 06 CAL CK 0030
In the Calcutta High Court

David Elias Duek Cohen

APPELLANT

Vs

Baidyanath Mukerji and Others

RESPONDENT

Date of Decision : 26-06-1936

Acts Referred:

Transfer of Property Act, 1882 — Section 58, 98

Trustees and Mortgagees Powers Act, 1866 — Section 12

Citation : AIR 1936 Cal 646

Hon'ble Judges : R.C. Mitter, J

Bench : Division Bench

Judgement

R.C. Mitter, J.—In this appeal, which has been preferred by the mortgagor, the legality of the appointment of a receiver by the mortgagee is in question. The Court of first instance declared the said appointment illegal, and restrained the person so appointed from taking possession of the mortgaged premises and from realising rent from the tenants in possession. The learned District Judge has however held otherwise and has dismissed the appellant's suit. Premises No. 57 (formerly No. 28) Ballyganj Circular Road, which comprised an area of 10 bighas 10 cottas 13 chittaks with buildings originally belonged to Miss Mary Jones. She had mortgaged the same to the Administrator-General of Bengal, who is the executor to the estate of Sagore Dutt, deceased. She sold the said premises, subject to the said mortgage to the appellant. The appellant executed on 27th July 1928 a mortgage in favour of her of the said premises for a sum of Rupees one lac. One of the clauses of the mortgage bond, the terms and conditions of which will have to be examined hereafter in detail, is that the mortgagor will have the right to dispose of any portion of the mortgaged premises and the mortgagee will have to realise and reconvey the said portion to the mortgagor or his nominee, provided that the price received for the same, less brokerage, was paid to the mortgagee.

2. In pursuance of this right reserved to the mortgagor, the appellant has sold about 7 bighas 2 cottas odd land out of the mortgaged premises, and the remaining area of about 3 bighas 8 cottas odd land together with the building

standing thereon is still subject to the mortgage. Interest being admittedly in arrears for over six months Mr. Deveria, acting on behalf of Miss Jones, and acting under a power of attorney executed by her on 12th February 1926, appointed, under the provisions of Section 12, Trustees and Mortgagees Powers Act, respondent 1, Mr. Baidyanath Mukerji, a pleader of Alipur, receiver on 16th June 1933. This gentleman having attempted to realise rent from the tenants occupying the mortgaged premises, the mortgagor, namely the appellant, brought the suit out of which this appeal arises, for a declaration that the said appointment was illegal, and from restraining Mr. Mukerji, from taking possession of the mortgaged premises or from realising rent or from disturbing the appellant's possession. The appellant's Counsel has presented his case before me on the following grounds: (i) As the mortgage is not an English mortgage, the appointment of Mr. Mukerji by the mortgagee as receiver is invalid. (ii) Even if the mortgage is an English mortgage, the Court only can appoint a receiver, Section 69-A added to the Transfer of Property Act, by Act 20 of 1929, having abrogated Section 12, Trustees and Mortgagees Powers Act. (iii) The appointment of a receiver could not be made at the time at which it was not made according to the terms of the mortgage instrument as the mortgage money had not at that time become due and payable. (iv) At any rate the mandatory provisions of Section 12, Trustees and Mortgagees Powers Act, have not been complied with, as Mr. Mukerji, was nominated receiver by Mr. Deveria, before the expiry of ten days from the time when the letter written by the latter asking the appellant to nominate a receiver reached him. And (v) Mr. Deveria had no power under the terms of his power of attorney to appoint the receiver.

3. Besides meeting the points raised by the appellant's Counsel Dr. Mukerji, appearing on behalf of respondent I, has raised a further point. He says that even if the mortgage be not an English mortgage, it is undoubtedly an anomalous mortgage, and according to the provisions of Section 98, T. P. Act, the rights and liabilities of the mortgagor and mortgagee must be determined in accordance with their contract. He further contends that by the contract the mortgagee has been given the power to appoint a receiver in accordance with the provisions of the Trustees and Mortgagees Powers Act In the view I am taking of the first point raised by Mr. Carden Noad it is necessary to deal with this further point raised by Dr. Mukerji, although I must admit that there is great force in his argument. In order to decide the first point it is necessary to recite the main terms of the mortgage instrument.

4. The mortgagor admits receipt of one lac of rupees and promises to repay it with interest on 27th July 1938. He expressly conveys No. 57, Ballygunj Circular Road, absolutely to the use of the mortgagee but subject to the provision that on repayment of the mortgage money with interest it is to be reconveyed to him by the mortgagee. The mortgagor undertakes to pay rates and taxes and other impositions " now or hereafter to become payable" in respect of the mortgaged premises. Part payments of the principal are to be made on fifteen days" notice. The mortgagor reserves the right to substitute with the consent of the

mortgagee other properties as security for the mortgagee's dues and the mortgagee cannot withhold this consent if the properties proposed to be given as substitutes are of a certain value defined in the third clause of the instrument. On such substituted security being given the premises then included in the mortgage are to be reconveyed to the mortgagor by the mortgagee. The mortgagor reserves the right to sell any portion of the mortgaged property, and the mortgagee is bound to release and reconvey the said portion so sold at the cost of the mortgagor to him or his nominee, provided that the price obtained, less the brokerage commission, was paid to the mortgagee. In default of payment of the mortgage money or interest on 27th July 1938 or in default of payment of any money which the mortgagor undertook to pay, the mortgagee will have the right to enter into possession and realise rents and profits. The instrument then provides that it is to be considered as an English mortgage as defined by the Transfer of Property Act and

the power of sale and provisions ancillary or auxiliary thereto conferred upon the mortgagee by the said Act or by Sub-section 6 to 19 inclusive of Act 28 of 1866 (I. C.) or any statutory modification thereof shall apply and be deemed to be incorporated in these presents but without the restriction of the last mentioned Act (Act 28 of 1866 I. C.) contained as to giving notice, provided also and it is hereby agreed and declared that the power of sale hereinbefore provided shall not be exercised unless and until default shall be made in the payment of the said principal sum of Rupees one lac or any part thereof or any other moneys that may become for the time being due and payable together with interest, if any, thereon on 27th July 1938 or at any other time when the same may become due and/ or payable.

5. It is contended by the counsel for the appellant that the clause by which the mortgagor undertook to pay taxes and rates, the clause for substitution of security and the clause for sale of portions of the mortgaged premises by the mortgagor make the mortgage which would otherwise have been an English mortgage not an English mortgage but an anomalous mortgage. His contention proceeds upon the basis that by an English mortgage the mortgagee is made the full owner till redemption, and on redemption only the title is re-vested in the mortgagor by the act of reconveyance by the mortgagee. In support of his contention he relies upon the cases in *Satya Charan Srimaniv. Ramkinkar Banerji* 1935 Cal 659 and *Narayana Ayyar v. Venkata Ramana Ayyar* (1902) 25 Mad 220. I cannot accept the contention that the mortgage here is not an English mortgage. The mortgagor binds himself to repay the money lent on a certain day; he conveys the property absolutely to the mortgagee and there is the provision for re-conveyance by the mortgagee to the mortgagor on repayment of the loan. On substitution of security the original security is to be released by the mortgagee but only through a re-conveyance, and on sale of portions of the mortgaged premises the same is to be realised by the mortgagee on fulfilment of certain conditions but also through such a re-conveyance. The only other thing pointed out by Mr. Noad is that by his undertaking to pay rates and taxes the

mortgagor retained to himself some of the obligations of an owner. He says that indicates that absolute ownership was not really intended to be conveyed to the mortgagee I do not quite follow this argument. The deed conveys absolutely the mortgaged premises to the mortgagee in express terms, subject to the proviso for redemption. I do see that when by contract the mortgagor undertakes to discharge some of the liabilities which ordinarily are to be discharged by an owner, how can he be said to have retained some of the rights of the owner. To follow the contention to its logical effect, when the mortgagor retains possession under a contract embodied in the mortgage, the mortgage cannot be considered to be an English mortgage even if all the three elements of an English mortgage, as defined in Section 58, T. P. Act, be present, for in that case it may be urged with greater force that the mortgagor by contract retains the valuable part of ownership. In India a mortgage is the transfer of an interest in specific Immovable property; in substance it is not the transfer of the whole interest of the mortgagor to the mortgagee. In determining such questions, in my view Clause (a) of Section 58, T. P. Act, cannot be ignored. The view I am taking is supported by two decisions of the Division Bench, namely in *Fala Krista Pal v. Jagannath Marwari* 1932 Cal 775 and *Satya Priya Ghoshal v. Borid Baran Mukerji* (1936) 40 C W N 846 In *Satya Charan Srimaniv. Ramkinkar Banerji* 1935 Cal 659 the learned Judges were also inclined to follow 36 C W N 709 *Fala Krista Pal v. Jagannath Marwari* 1932 Cal 775 and although one of the learned Judges (Guha, J.) relied upon the fact that the mortgagor undertook to pay rents royalties for coming to the conclusion that one of the mortgages was not an English mortgage, but the other learned Judge (Laged, J.) did not think it necessary for the case before them to decide whether the said mortgage was an English mortgage or not. That observation of Guha, J. at the bottom of p. 33 of the report relied upon by the Counsel for the appellant cannot therefore be considered to be the decision of a Division Bench and so binding on me.

6. I accordingly, hold that the mortgage which the appellant executed in favour of Miss Mary Jones is an English mortgage. By the terms of Section 69, T. P. Act, before amendment, and by the contract between the parties also, Section 12, Trustees and Mortgagees Powers Act, has been incorporated in this mortgage. In my judgment Section 69-A, introduced into the Transfer of Property Act by Act 20 of 1929 (I. C.), has not repealed or modified that section, namely Section 12 of Act 28 of 1866; but the only effect of the amendment in my judgment is that Section 12 of Act 28 of 1866 is not to be deemed to be incorporated in an English mortgage, *proprio vigore* executed after the amending Act came into force. In this case the mortgage was executed before the amending Act and the terms and incidents thereof, including the term and conditions introduced into the deed by virtue of Section 69, T. P. Act, as in force at the date of the mortgage, including the term about the appointment of receiver by the mortgagee without recourse to Court have not been modified or affected by reason of the amendment by Act 20 of 1929 by which the last paragraph of the original Section 69 has been taken out of the statute. Interest for more than six months was admittedly due at the

time of the appointment of respondent 1 as receiver. As I construe the mortgage instrument the power of sale could not be exercised before 27th July 1938 or till the mortgagor made default in payment of taxes and rates, etc., but the power of appointment of receiver could be exercised before the said date or before the said events, if interest for six months was due. I accordingly overrule the first three points urged on behalf of the appellant.

7. Regarding the fourth point, the facts are these: Mr. Deveria wrote a letter to the appellant on 2nd June 1933 requiring him to nominate a person as receiver. The appellant received the letter on 6th June 1933 and did not nominate a person as receiver. Mr. Deveria appointed respondent 1 as receiver on 16th June 1933. The learned District Judge has held that the period of 10 days mentioned in Section 12 of Act 28 of 1866 is to be counted from the date of the letter and not from the date of the receipt of the same by the appellant. Here he is wrong. Time is to be counted from the date of delivery of the letter to the appellant. The statute plainly gives the mortgagor a period of 10 days to make his choice. But I do not think that the appointment made on 16th June 1933 is invalid, because in my judgment the mortgagor, by his contract as embodied in the mortgage is not entitled to 10 days' time as provided for in Section 12. The words there are to this effect: "but without restriction in the last mentioned Act (Act 28 of 1866) contained as to giving notice." This in my judgment is sufficiently comprehensive. I accordingly overrule the fourth point also urged on behalf of the appellant.

8. Regarding the last point I hold that under Clause (2) of the power of attorney which Mr. Deveria held for Miss Jones he could exercise the power he has exercised in this case. The attorney is given the power "to execute or enforce powers of sale or other rights, power of receiving incident to such mortgages, charges or securities." This point however was not raised in either of the Courts below and if raised in the Court of first instance could have been met by the plea of ratification by the principal, or the assumption that Mr. Deveria had not the power of appointing a receiver of the mortgaged premises. It would accordingly be wrong to allow the appellant to urge this point for the first time here. I accordingly overrule all the points urged on behalf of the appellant and dismiss this appeal with costs. It must be however made clear that respondent 1 is the receiver in respect of that portion of premises No. 57 Ballygunj Road which is still under mortgage. Leave to appeal u/s 15 of the Letters Patent is refused.