
(1932) 03 CAL CK 0026
In the Calcutta High Court

Fala Krista Pal and Others

APPELLANT

Vs

Jagannath Marwari and Others

RESPONDENT

Date of Decision : 04-03-1932

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 34 Rule 6

Citation : AIR 1932 Cal 775 : 140 Ind. Cas. 788

Judgement

1. These two appeals have arisen out of a decree which purports to have been made under Order 34, Rule 6, Civil P.C. The suit was commenced by the plaintiff on 8th November 1924 against four sets of defendants namely, defendant 1 Ghose, defendant 2 Paul, defendants 3 to 5 the Bagris and defendant 6, the Bengal National Bank Ltd. The bank having subsequently gone into liquidation, the liquidators were brought in as defendant 6. On 24th February 1925 a firm carrying on business under the name and style of Khangarji Amrita Lal & Co. were added as defendant 7.

2. On 6th March 1919 defendant 1 had obtained a coal mining settlement in respect of coal lying under 366 bighas of land in mauzha Banbahal from the plaintiff and executed in his favour a kabuliyat stipulating to pay royalty at certain rates for the different kinds of coal to be taken and a minimum annual royalty of Rs. 5,000 that is to say at the rate of Rs. 400 a month from January to November and Rs. 600 in December and undertaking that if the royalty for each month was not paid within the 15th day thereof he would pay interest at the rate of Rs. 2 per cent per month till realization, and further stipulating that if the minimum royalty for two consecutive months be not paid within the third month the plaintiff would be competent to take khas possession of the colliery with all its appurtenances and creating a first charge on the leasehold lands machinery, stores, furniture etc., for the royalty and for all sorts of dues of the plaintiff. The suit was for recovery of minimum royalty from January 1923 to October 1924, both months inclusive, together with interest. The prayers were on the lines indicated in Order 34 of the Code. A more detailed reference will be made hereafter to the averments and prayers made in the plaint.

3. As regards the connexion of the other defendants with the subject-matter of the suit it would be sufficient to state the following: On 29th March 1923, defendant 1 executed a mortgage in favour of defendant 2 on receipt of Rs. 42,000 and assigned to the latter the leasehold together with the colliery and all its appurtenances, the deed being in the form of an English mortgage. On 4th April 1923 defendant 1 executed a further mortgage in similar terms in favour of defendants 3 to 5, assigning over the same properties, subject to the mortgage in favour of defendant 2, as security for Rs. 70,000 said to have been due to the said defendants on advances previously made by them. On 14th December 1923 defendant 2 assigned his mortgage debt and security to the Bengal National Bank Ltd., defendant 6. On 14th November 1924 a managing agency agreement was executed by defendant 1 in favour of defendant 7 and to this deed defendants 3 to 5 and 6 were parties.

4. On 28th April 1925 a solenama was filed as between the plaintiff and defendant 1 and on the same day, after examination of a witness who proved the charge-created by the kabuliyat executed by defendant 1 in plaintiff's favour and also said that defendant 1 had mortgaged the properties to the other defendants, a decree was passed on the solenama as between the plaintiff and defendant 1 and ex parte as against the other defendants. To the terms of this decree reference will hereafter be made. The properties charged were sold in pursuance of this decree but fetched Rs. 1,525 only, a small part of the decretal dues.

5. About two years after, on 1st March 1928, the plaintiff applied under Order 34, B. 6, Civil P. C., for a personal decree against all the defendants for a sum of Rs. 14,843 which, he alleged, was due and unrealized on account of the decree of 28th April 1925. He asserted that defendant 1 was the original lessee and the other defendants were mortgagees in; possession and were, in fact, in possession by receipt of the usufructs of the colliery. To this prayer the defendants objected. The Subordinate Judge took evidence and eventually held that the plaintiff was entitled to such a decree as against defendants 1 to 6 and made it for Rs. 17,000 odd on 30th September 1929.

6. The two appeals are from the said decree: No. 8 has been preferred by defendant 2, Paul; and No. 15 by defendants 3 to 5, the Bagris.

7. One singular feature of this case is. that if the pleadings and proceedings leading up to the decree of 1925 and the terms of that decree are carefully examined, it would seem that till that decree was passed the plaintiff never thought of obtaining in this suit anything beyond what he got under that decree, and it would also seem that the idea of having proceedings on the lines indicated in Order 34, Rule 6 as against defendants other than defendant 1 originated only at or about the time when the application was made for a decree under that rule. In the plaint the only averments relevant on the point were contained in paras. 11 and 17 which ran thus:

11. After taking a settlement of the colliery from the plaintiff defendant 1 came

into possession thereof from the date of the settlement and he is possessing the same under the plaintiff,

"17. Defendant 1 has been in peaceful possession of the property settled, under the plaintiff, since the date of the settlement. The plaintiff has come to know that defendant 1 has mortgaged the leasehold property to" defendants, 2, 3, 1 and 5 and that defendant 2 has again hypothecated the mortgage deed to defendant 6. The plaintiff makes defendants 2 to 6 parties for the purpose of getting the property described in Schs.(ka) and (kha) below, free from all encumbrances, and for realizing his dues from the said property as a first charge thereon.

8. In prayer (ka) a decree for Rupees 10,000 odd against all the defendants was asked for prayer (kha) was for declaration of a first charge for the money due to the plaintiff. In prayer (ga) it was prayed that if the defendants did not pay the decretal amount within the time fixed by the Court the decree might be made absolute and orders might be passed for realization thereof by sale of the properties charged. Prayer (gha) asked for a personal decree against defendant 1 in case of deficiency. Prayer (una) related to interest and costs. Besides, there was a general prayer for such additional or alternative reliefs which the plaintiff might be entitled to under the agreement and according to law, justice and equity.

9. The solenama effected as between the plaintiff and defendant 1 was that a decree for the amount claimed together with interest and costs should be passed, that a first charge as asked for should be declared and that 15 days" time should be given to defendant 1 to pay up the royalty and interest which had not been sued for. It was provided that if such payment is made, but not otherwise, defendant 1 will have four months" time to pay up the decretal amount, or else on the expiry of the said 15 days the decree shall be regarded an final and absolute and the properties charged would be sold. It was further provided that if the entire dues be not realized by the sale plaintiff shall realize the balance of his dues by the attachment and sale of defendant 1"s other moveable and immovable properties or from his person.

10. The only evidence then adduced by the plaintiff was what was barely sufficient to prove the settlement which defendant 1 had taken and the witness who gave that evidence only said in addition that defendant 1 had mortgaged the properties to the other defendants. And thereupon the following decree was passed.

It is ordered and decreed that the suit be and the same is hereby decreed in terms of solenamah against defendant 1 and ex parte as against other defendants. The period fixed by the solenamah is also fixed as against the absentee defendants as the period of grace within which the decretal amount is to be paid up. In. default the leasehold properties Ka and Kha are to be sold for satisfaction of the decree. And that the sum of Rs. 990-6-3 be paid by defendant 1 to the plaintiff on account of the costs of the suit with interest thereon at the

rate "of 12 per cent per annum from this date to date of realization.

11. We are unable to see that any further questions remained to be decided or determined by the Court upon the pleadings in the plaint and the prayer contained thereon. This view has been contested on behalf of the plaintiff upon various grounds which may perhaps be put in order and summarized as follows: It has been urged that the suit was a suit for sale on the basis of a mortgage and the decree should be regarded as a preliminary decree for sale under Order 34, Rule 4 or in any event as including a final decree for sale under Order 34, Rule 5 of the Code and can on no account be regarded as a. decree under Order 34, Rule 6. It has also been argued that at least so "far as the defendants other than defendant 1 are concerned the decree was nothing more than a decree for sale following which there can always be a decree under Order 34, Rule 6. It has further been contended that in the plaint a decree against all the defendants had been asked for and. that although it may be that for some reason or other a personal decree against defendant 1 only had been prayed for it was always open to the plaintiff to apply for a personal decree against the other defendants later because it was not until a decree under Order 34, Rule 5 had been passed and a sale held thereunder had proved insufficient that the stage would arrive when such a decree could be made. It has lastly been argued that at the stage at which the decree was passed a decree under Order 34, Rule 6 would be entirely without jurisdiction. The matters to which our attention has been drawn in support of the grounds aforementioned have therefore to be dealt

12. In support of the contention that the Subordinate Judge had no jurisdiction to make a personal decree at the stage at which the decree referred to above was made the decision of this Court in the case of *Lakhi Narain v. Kirtibas Das* [1931] 19 I.C. 971 has been cited. That the procedure prescribed in Sections 89 and 90, T. P. Act 1882 and by the rules in Order 34 of the Code did not and does not contemplate such a decree at such a stage cannot be disputed. The very terms of Section 90 and of Rule 6, Order 34 show that such a decree can be passed only after it has been ascertained that the nett proceeds of the sale of the mortgaged properties are insufficient to pay the amount of the decree. Though this is so in many cases on some of which the plaintiff himself relies for establishing this position decided both under the Transfer of Property Act and under the Code, composite decrees embodying not merely what the decree for sale should be but also decisions as regards personal remedies have been passed by Courts. And when so passed they have not been regarded as altogether invalid but only the question whether a further decree could be had or not has been held to depend upon the terms of the decree already made: e. g. *Dinabandhu v. Mashuda Khatun* [1912] 17 I. C. 263 *Khulna Loan Co. Ltd. v. Jnanendranath Basu* AIR 1917 P.C. 85 *Sitanath Saha Banik v. Madan Mohan Das* [1919] 53 I.C. 904 and *Damodar v. Vyanku* [1907] 31 Bom. 244 If ever there was a doubt as regards the validity of such a decree that doubt has been completely removed by the decision of the Judicial Committee in the case of *Jeuna Babu v. Parmeshwar Narain Mahta* AIR 1918 P.C. 159 in which it was

pointed out that it is not necessary to put such a construction on Section 90, T. P. Act (4 of 1882) as would establish as a condition precedent to the power of decreeing personal payment of the balance that the mortgaged property must first be sold and found insufficient to satisfy the debt but that the words of the section are satisfied in cases where the Court passes a decree that on the happening of the event when the nett proceeds of the sale are found to be insufficient the balance should be paid. It is therefore unnecessary to proceed on the assumption that it is impossible in any case to regard the decree that was passed in this case as a combined decree. The real question is: Can it be so construed. The decree expressly says:

The suit be and the same is hereby decreed in terms of the solonamah against defendant 1 and the solenamah itself is appended to the decree,

and one of the terms of the solenamah is term No. 7, viz. that:

if all the dues of the plaintiff be not realized from the said colliery and machineries etc. the plaintiff shall realize the balance of his decree by an attachment and sale of other moveable and immovable properties of the defendant or from his person.

13. It is difficult to imagine how it can be contended that the decree is not a combined decree unless it be on the following grounds which the plaintiff has put forward. It has been said in the first place that as it was not a matter within the province of the Court to consider at that stage whether a personal decree should be passed or not the decree should be construed as being limited to the other provisions of the solenama and as not including term No. 7. Such a supposition is impossible in view of the ex-press terms of the decree and further because such a construction would have for its basis an impossible assumption that the terms of the solenama were varied by the Court in so far that one of its essential terms will have to be regarded as having been left out. Three cases have been cited which it has been said would favour such a construction. The first one is the case *Dooly Chand Srimaly Vs. Mohanlal Srimali and Another*, the bearing of which decision upon the question before us is not apparent unless it be the plaintiff's contention that the compromise was unlawful or in contravention of law or was one which did not satisfy the requirements of Order 23, Rule 3, and therefore unfit to be recorded. We cannot conceive why it should be held that it was not open to the plaintiff and defendant 1 to adjust the suit as between themselves and put an end to it altogether by entering into a compromise by providing for a personal remedy also. The next case referred to is the case of *Malchand Boid and Others Vs. Osman Ali Mandal and Others*, . What happened in that case was this. A suit was brought by mortgagee 1 to enforce a mortgage security, and in it the mortgagors as well as second mortgagees were made parties.

14. The claim was decreed in part by the primary Court. During the pendency of the appeal a petition of compromise was filed which purported to settle the differences between the plaintiffs and the mortgagors. The second mortgagees

ware not parties to the settlement. The effect of the compromise was to increase the amount payable under the decree to the plaintiffs. It was held that a decree could not be passed in accordance with the compromise. The case in our opinion has decided nothing which may be useful in the present case. The third case is that of Sundermull and Others Vs. John Carapiet Galstaun, which has been affirmed by the Judicial Committee in *Sunder Mull v. J. C. Galstaun* [1931] 137 I.C. 672 (P.C.). This case was cited, as far as we could understand, in support of the contention that even though the solenama and the decree based on it, passed at an antecedent stage, may have dealt with the question of personal remedy, yet when the stage arrives at which a decree under Order 34, Rule 6 can be passed the Court's power is absolutely unfettered to make a decree in accordance with that rule irrespective of the terms of the solenama. We are unable to hold that the case is an authority for any such proposition. What was contended in that case was that

even supposing there was no bargain to the effect that the defendants should be relieved of their personal liability

when the preliminary decree under Rule 4 and the final decree under Rule 5 were not in complete accordance with law by reason of the fact that they were in terms of the solenama between the parties, a decree u/s 6 could not be tolerated. This contention was rejected and it was held that strict compliance with the terms of the previous rules was not an invariable antecedent to the awarding of a personal decree. The learned advocate of the plaintiff also took his stand upon another position. He urged that at least so far as defendants other than defendant 1 are concerned, the decree under consideration was nothing but a decree for sale in accordance with Rule 5, Order 34 and that therefore it was open to the plaintiff to apply for a decree "against them under Rule 6 when the sale proceeds proved insufficient. But as against them, what was the true meaning of the decree ? It has been urged that it was a decree against them as such a decree could be against the mortgagor, defendant 1 himself. Beading the averments in the plaint, to which reference has already been made, it is plain beyond the faintest doubt that those defendants were made parties to the suit in their capacity of puisne encumbrancers and not on the ground of any liability for the mortgage debt, nor on the ground of their having been in possession. Indeed, it was never suggested that they were ever in possession, while in the clearest possible words the possession of defendant 1 was averred and pleaded.

15. In the evidence of the one witness who was examined on plaintiff's behalf which formed the basis of the decree that was passed against "them ex parte, not one word is to be found as regards the possession of those defendants, and even the encumbrances in their favour were not specifically proved. But, in any case, there was nothing disclosed either in the plaint or in the evidence which would suggest even remotely that as against them any decree except such as could be made against puisne encumbrancers was intended. It has not been, nor can it be, disputed that a personal decree against a" puisne encumbrancer,

merely on the footing of his being a puisne incumbrancer, is out of the question. But it has been argued that the prayers in the plaint in which the word defendants " in the plural is used, show that a joint and several decree for the money as against all the defennants was asked for and that the use for the money as against all the defendants was asked for and that the use of the word in the decree is indicative of an intention to make such a decree. On the averments to which we have referred such an interpretation is not possible : it would mean that a prayer for a joint and several decree was made against the mortgagor as well as the puisne incumbrancers on no other footing than that;they were puisne encumbrancers; and it would leave unexplained why in prayer (gha) a personal decree against defendant 1 only was asked for. Moreover if the decree is to be construed in the way contended for on behalf of the plaintiff, namely as being a decree for money against all the defendants, where was the room for a personal decree at all? In that case the money could have been realized from their personal and other properties even on the decree as it stands.

16. Having considered the terms of the decree with care we can find no escape from the conclusion that it was a combined decree under Rules 5 and 6 against defendant 1 on the basis of the solenama and embodying all its terms; and as against the defendants other than defendant 1 it meant to give the plaintiff all the reliefs that he was entitled to under his plaint, namely such reliefs as he was entitled to in order to have the properties concerned sold free from their encumbrances--"which was the prayer he had made--and all that was necessary to provide for that purpose was embodied in the decree. The question whether the plaintiff could ask for a further decree against defendant 1 under Rule 6 when the amount left unrealized by the sale was ascertained does not arise for consideration here. But so far as the other defendants are concerned, we are clearly of opinion, there was no room for any further decree.

17. Some papers have been produced before us on behalf of the plaintiff to show that in the proceedings relating to the sale that was held, the other defendants or some of them joined with defendant 1 in making an application u/s 47 of the Code in which the insufficiency of the value stated in the sale proclamation was pleaded. It has been argued that from this fact it should be inferred that a joint and several decree as against all the defendants had in fact been passed, because they must have joined in that application on that assumption. We cannot say why those defendants did so; but even such an assumption cannot, in our judgment, alter the character of the decree such as it really was. We are therefore of opinion that the proceedings which led to the passing of the decree from which the appeals before us have boon taken were entirely misconceived and that the decree itself cannot stand. What we have already said is, in our opinion, sufficient for disposing of this appeal. But the appellants have sought to repudiate their liability for a personal decree upon various other grounds. Inasmuch as the case may not rest here, we proceed to deal with those grounds, though quite shortly. It has been urged that the settlement in this case created a

charge which, since the provisions of the Transfer of Property Act, 1882 came to be introduced in the Code of 1908 in the shape of Order 34, and prior to the amendments of that order in 1929, could only be enforced by the provisions as to sale or redemption contained in that order. Rule 15 of that order ran in these words:

All the provisions contained in this order as to the sale or redemption of mortgaged properties shall, so far as may be apply to property subject to a charge within the meaning of Section 100, T. P. Act, 1882.

18. In the case of *Uttam Ishlok v. Phul-man Rai* [1905] 2 A.L.J. 379 Banerjee, J., expressed the view that the holder of a charge was like a mortgagee suing for sale entitled to ask for and obtain a decree u/s 90, T. P. Act, and unless he be a person who is not entitled to a personal remedy against the person whose property is subject to the charge, he was entitled to obtain such remedy in view of the wide words of that section. He was of opinion that the words

all the provisions hereinbefore contained as to a mortgagor shall so far as may be apply to the owner of such property and the provisions of Sections 81 and 82 and all provisions hereinbefore contained as to a mortgagee instituting a suit for the sale of the mortgaged property shall so far as may be apply to the person having the charge

although they referred to the rights of a mortgagee instituting a suit for the sale of the mortgaged property and did not in terms refer to any other property, were wide enough to include the right to obtain a personal decree in accordance with Section 90 of the Act. Richards, J., was of opinion that the words referred to only those provisions which deal with a sale of the mortgaged property. In the same case when it went up on appeal under the Letters Patent, *Uttam Ishlok v. Ram Narain Rai* [1906] 28 All. 365 the question was not decided, but the view of Banerjee, J., was approved. In 1908 the words of Section 100 were cut down; the words

all provisions hereinbefore contained as to a mortgagee instituting a suit for the sale of the mortgaged property

were deleted and the matter was reproduced in Order 34, Rule 15 as set out above. The words of that rule in their ordinary significance would limit the applicability of only those provisions in the order which relate to the sale or redemption of mortgaged property to property which is subject to a charge. The remedy by way of a personal decree therefore was not provided for in the order. But from this we are not inclined to hold that the charge-holder would not have a personal remedy. Holders of charges, which are not recognized as mortgage under any statutory enactment, have always been treated by the Courts as on much the same footing as mortgagees, and if it was the intention of the amendments of 1908 to take away the personal remedy from a charge-holder we think the matter would have been expressly dealt with. In the case of *Jeuna Baku v. Parmeshwar Narayan Mahthar* AIR 1918 P.C. 159 the charge created by

deposit of title-deeds which was not recognized as a mortgage under the then existing law was allowed to be attended with a personal remedy. There is also a decision in the case of AIR 1930 10 (Oudh) in favour of this view in which however no reason is given. We are inclined to overrule this contention. Then it has been contended that these defendants, on the footing of the assignments they obtained under the mortgages in their favour, were not liable for the plaintiff's dues. This contention has been urged on two grounds. In the first place it has been said that the settlement itself was not a lease. A lease of immovable property u/s 105, T. P. Act, is the transfer of a right to enjoy such property. It is said that in the settlement in the present case there was no question of any enjoyment of the property, but what was given by it was the right to take out coal, and therefore the settlement did not amount to a lease. In support the observations of Lord Cairns in *Gowan v. Christie* [1873] 2 H. L. Sc. & Div. 273 have been quoted:

Although we speak of a mineral lease or a louse of mines the contract is not in reality, a -lease at all in the sense in which we speak of an agricultural lease. There is no fruit that is to say there is no increase, there is no sowing or reaping in the ordinary sense of the term; and there are no periodical harvests. What we call a mineral lease is really, when properly considered a sale out and out of a portion of land. It is the liberty given to a particular individual for a specific length of time, to go into and under the land and to got certain things if he can find them and to take them away just as if he had bought so much of the soil.

19. Other cases also have been cited in support in which *Gowan v. Christie* Supra has been referred to: *Coltness Iron Co. v. Black* [1881] 6 A.C. 315 *Campbell v. Wardlaw* [1883] 8 A.C. 641 *Munro v. Didcott* [1911] A.C. 140 *Faki Ismail v. Umabai* [1883] 7 Bom. 425 *Prince Mahomed Baktyar Shah v. Rani Dhajamani* [1905] 2 C. L. 3. 20. Reliance has also been placed upon the observations of their Lordships of the Judicial Committee in the cases of *Giridhari Singh v. Meghlal Pandey* AIR 1917 P. C. 163 and *Bejoy Singh Dhudhuria v. Surendra Narayan Singh* AIR 1928 P. C. 234 that the essential characteristic of a lease is that the subject is one which is occupied and enjoyed, and the corpus of which does not in the, nature of things and by reason of the user disappear.

20. In the present case the kabuliyat states that if any surface is required lease thereof would have to be taken, and this too supports the appellant's contention that what was payable under the settlement was not rent but only the price by instalment of the quantities of coal taken. For certain purposes therefore and in order to consider whether some particular principle or dictum applicable to leases strictly socalled to mining leases, a distinction may have to be drawn since such a distinction undoubtedly exists. But settlements of this character are everywhere regarded as leases, and indeed the mortgagor as well as the appellants have, as the documents show, dealt with the subject-matter on the footing of its being a leasehold. We are not prepared to regard the settlement as anything else than as a lease though not falling strictly within the definition

contained in Section 105, T. P. Act, or partaking of the essential character of a lease within the meaning of the statute. Some portion, however small, of the surface had to be used for carrying on the mining operations and taking the coal out, and to that extent the transaction may be taken to (satisfy the requirements of the definition, We have not here to determine the extent of the leasehold. The second ground urged, so far as this contention is concerned, is that even if the transaction amounted to a lease, its assignment by way of English mortgage did not create a liability on such mortgagee in respect of the royalty. The decision upon which the Court below has relied for holding that such liability was created is the case of *The Bengal National Bank v. Janaki Nath Roy* AIR 1927 Cal. 725.

21. In that case Rankin, C. J., expressed the view that the English law as to the liabilities of assignees of leaseholds depends entirely upon a distinction between legal and equitable estates a distinction for which the Transfer of Property Act has left no room in India and which is not to be imported into Indian law, that when a lessee executes an English mortgage his right to redeem is a right on certain conditions to get it back and in India this right cannot be looked upon as an equitable estate existing before re-assignment and that it cannot be held that in India a lessee does not part with his whole estate under an English mortgage and further that the whole of the interest of the lessee having been assigned over to the mortgagee the latter becomes liable for the rent. There are difficulties in the way of adopting this view in its entirety, or in any event in applying it to the present case. The definition of an English mortgage as given in the Transfer of Property Act, Section 58, Clause (e) must be read subject to the definition of a mortgagor as given in Clause (a) of that section and consequently an English mortgage in India can hardly be regarded as the transfer of the entire estate of the mortgagor to the mortgagee; it is correct however not to regard what is left in the mortgagor as an equitable estate, but it is nevertheless some estate, an interest only in the estate having been transferred under the mortgage. In our opinion therefore it is not easy to say of an assignment by way of an English mortgage in India executed by a lessee that the whole of his estate passes under the [mortgage to the mortgagee.

22. The provisions of the Transfer of property Act must be regarded first before resorting to the law and practice as it obtains in England : AIR 1930 59 (Privy Council) . Then, the rule in *William v. Bosanquet* [1819] 3 Moore 500 that when a party takes an assignment of lease by way of mortgage as a security for money lent, the whole interest passes to him and he becomes liable on the covenant for payment of rent though he has never occupied or become possessed in fact, which is the rule on which the decision in the case of the *Bengal National Bank Ltd. v. Janaki Nath Roy* AIR 1927 Cal. 725 has proceeded is itself a rule which applies only if there is no special provision to the contrary : see *Haig v. Homan* 4 Bligh. N. Section 380. Indeed in the case of the *Bengal National Bank Ltd.* supra AIR 1927 Cal. 725 there was an express covenant in the mortgage for payment by the mortgagee of the rent reserved by the lease. In the case before us the mortgagor covenanted with the mortgagees, i. a., both sets of appellants, that so

long as any money remained due under the mortgage he would go on paying the royalties, etc. We are accordingly of opinion that the appellant Paul merely by reason of his being an English mortgagee was not liable for the royalties due under the lease. Then again the case of the appellants, the Bagris, seems to us to rest on a still higher footing. They were as already stated subsequent mortgagees the dead in their favour being also in the form of an English mortgage. It is very difficult to see what estate, if at all, passes to such mortgagees. If the English law is to be applied they are not liable. Cave, J., in the case of *In re Gee Ex parte Official Receiver* [1889] 24 Q. B. D. 65 observed:

Undoubtedly in an ordinary ease of assignment for value the assignor after the assignment remains liable on his covenants, and the assignee is also liable on them by virtue of privity of estate. It is only on the ground of privity of estate that the trustee would ever become liable on those covenants; and, inasmuch as the previous assignment has transferred that liability to the assignee, leaving on the bankrupt (i. e., the mortgagor) only the liability under the covenants arising out of privity of contract he ceases to have the land burdened with onerous covenants. It is true that some years ago a question did arise as to whether in the case of a mortgage the general rule applied. This however was decided in the affirmative a considerable time ago; and it cannot be doubted at this day that where there is an assignment of the whole term to a mortgagee, the mortgagee becomes by virtue of the assignment the owner of the lease burdened with the covenants, and the assignor no longer possesses any land with onerous covenants which can by virtue of the statute become vested in the trustee. It is true that the assignor, where the assignment is by way of mortgage, retains the equity of redemption; but that is an equitable right which is not burdened with onerous covenants. It is not because he is the owner of the equity of redemption that he can be compelled to perform the covenants, but solely by virtue of the privity of contract that exists between him and the lessor, and that liability cannot by bankruptcy be transferred to the trustee.

23. In the *Mayor, etc., of Carlisle v. Blamire* [1807] 8 East. 487 at p. 497 it was said:

Whether a mortgagee who has not entered be or be not liable to an action of covenant as assignee, it is quite clear that the devisees of an equitable estate are not so.

24. We are therefore of opinion that even in a, suit properly framed for recovery of royalty from all the defendants none but defendant 1 could be made liable. Lastly it has been contended that a decree for personal liability against the appellants on the footing of their having been in possession is also not supportable, because, apart from anything else, they were in point of fact never in possession. The Subordinate Judge in holding against the appellants on this point has relied upon three pieces of materials: that there was no express denial on their part that they were in possession; that there was an admission of such possession contained in a petition of claim; and that they were parties to the

agreement under which defendant 7 was appointed managing agents. As regards the omission to deny we do not set much store by it as it is not so clear that such denial was necessary. The admission contained in the petition of claim, to which however it should be stated, the appellant Paul was not a party, is explained by the appellants the Bagris, and in our opinion that explanation is not unworthy of acceptance. So far as the managing agency agreement is concerned it is clearly an agreement by which only the mortgagor, defendant 1, appointed the managing agents with the concurrence of the Bagris and of the Bank, their consent being necessary to vary the order of their respective charges and to create a first charge in favour of the managing agents and from this deed no inference can legitimately be made that the appellants were in possession.

25. On the other hand, the statements in the plaint, an affidavit of the plaintiff's agent one Dhajadhari dated 1st December 1924, the returns submitted under the Mines Act, and the letters Ex. A series and the other evidence on the record, oral and documentary, negative the position that the appellants were in possession. The Subordinate Judge has drawn an adverse inference against the appellants for nonproduction of their accounts but we are unable to agree with him in his conclusions. In the result we allow the appeals, and set aside the decree complained of in so far as it is against the defendants other than defendant 1. The appellants will be entitled to their costs in this Court as against the plaintiff-respondent, one hearing fee, which is to be divided equally between the appellants in the two appeals being allowed.

26. Any security, which the appellants may have deposited in pursuance of the order of this Court relating to stay of execution, will be returned to them.