

(1935) 05 CAL CK 0038
In the Calcutta High Court

Satya Charan Srimani and Others

APPELLANT

Vs

Ramkinkar Banerji and Others

RESPONDENT

Date of Decision : 20-05-1935

Acts Referred:

Transfer of Property Act, 1882 — Section 58(e)

Citation : AIR 1935 Cal 659 : 159 Ind. Cas. 1001

Hon'ble Judges : Lodge, J;Guha, J

Bench : Full Bench

Judgement

Guha, J.—These two appeals have arisen out of a suit in which the plaintiff-respondent in this Court claimed Rs. 27,867-14-0 as the minimum royalty, cesses and price of coal, from the defendants' the suit, basing the claim on a kabuliati executed on 3rd June 1908(Ex. 11 in the case), evidencing a lease for 999 years of underground right in Chak Sitalpur in Lot Gopinathpur. The history of title of the plaintiff as lessor on which the claim in suit was founded, was given in detail in the plaint, and has been set out in the judgment of the trial Court against which these appeals are directed. It is not necessary for the purpose of these appeals to consider the materials relating to the accrual of the plaintiff's title as lessor, as indicated in the different documents filed in Court, entitling him to claim the amount sought to be realised by him in the suit. In the written statement filed by the contesting defendants the statements made by the plaintiff as to the devolution of interest and accrual of his title were not specially denied or controverted; and no issue was raised on the question of the plaintiff's title as lessor. The plaintiff's claim was resisted by the mortgagees of the interest created by the lease and the transferees from the mortgagees in respect of the underground rights in chak Shitalpur, defendants 2, 5, 6 and 7.

2. The defence of defendant 2 in the suit does not require consideration in view of the position that in these appeals it was conceded on behalf of the plaintiff-respondent, that defendant 2 was not liable either jointly or individually for any part of the claim in suit. Defendants 2, 5 and 6 denied liability and denied the

plaintiff's statement in the plaint that they were in possession. On the pleading of the parties concerned, the material issue raised for determination in the suit was issue 7:

Whether defendants 2, 5, 6 and 7 are necessary parties to the suit? Whether they are in possession of the mortgaged property? Are they or any of them liable for the dues or any part of the dues of the plaintiff.

3. The Additional Subordinate Judge of Asansol, by whom the suit was tried, passed a decree on the basis of minimum royalty as given in Schedule 2 of the plaint, holding defendants 2, 5, 6 and 7 liable jointly and severally to the plaintiff. As the Judge in the trial Court has observed in his judgment, the point that was "very much debated" before him was this:

Whether the mortgagees and their transferees, the contesting defendants in the suit were liable for the plaintiff's claim for minimum royalty, etc.

4. The debate centered round the question whether the two mortgages executed on 18th May 1923(Exs. 2 and 5), were English mortgages or not. The decision of the trial Court on the question whether the mortgages were English mortgages or not, was in favour of the plaintiff; the Subordinate Judge held that on the footing that they were English mortgages, the mortgagees or their transferees were liable to the plaintiff in the suit. On the question of possession, the finding of the Court below was also in favour of the plaintiff; it has held that there was evidence on the record indicating possession of the mortgagees or their transferees. This finding on evidence on the question of possession was not relied upon by the plaintiff-respondent in this Court; and it was conceded in the course of argument of these appeals that there was no such evidence of possession on the record, as could support the view indicated by the Court below in its judgment. The basis of the decision holding defendants 2, 5, 6 and 7 jointly and severally liable for the claim made by the plaintiff in the suit was that the two mortgages under which these defendants claimed to be the mortgagees were English mortgages, and that on the authority of the decision of this Court in *Bengal National Bank Ltd. v. Janaki Nath Ray* 1927 Cal 725 a mortgagee in an English form of mortgage, in whom the entire interest of the mortgagor is transferred, and who becomes the owner of the mortgaged property, to all intents and purposes, takes upon himself the liability for rent. Defendant 7 has appealed to this Court from the decision and decree passed by the trial Court; and there is a separate appeal by defendants 2, 5 and 6. The appeal by defendant 7 is appeal from Original Decree No. 212 of 1931; the other appeal is No. 218 of 1931. As already noticed the plaintiff-respondent has not pressed his claim against defendant 2.

5. The main question in both these appeals is whether the mortgages in question evidenced by the documents Exs. 2 and 5 are the mortgages in English form or English mortgages as contemplated by Section 58(e), T.P. Act. The documents, although executed on the same date, are not exactly alike in stipulations,

provisions and the covenants contained in the same; and they have to be considered separately for the purposes of the two different appeals to this Court. The essentials of an English mortgage have been stated by the Judge in the Court below; the three essentials are: 1. That the mortgagor binds himself to repay the mortgage money on a certain date. 2. That the property mortgaged is transferred absolutely to the mortgagee. 3. That such absolute transfer is made subject to a proviso that the mortgagee will reconvey the property to the mortgagor upon payment by him of the mortgage money on the date on which the mortgagor bound himself to repay the same. In the mortgage Ex. 5, under which defendant 7, the appellant in appeal No. 212, claims, there are undoubtedly certain stipulations satisfying the three essentials of an English mortgage. There were in addition the definite provisions stated below, contained in the document:

It is hereby expressly agreed by and between the parties hereto, notwithstanding anything hereinbefore contained to the contrary that if the mortgagor pays interest payable under these presents to the mortgagee regularly on the day and in the manner hereinbefore applied for the payment thereof, then the mortgagee shall not recall the mortgage money until the eighteenth day of May one thousand nine hundred and thirty-three,

6. There was further this express stipulation contained in the document Ex. 5 in regard to the payment of rent and royalty as claimed in the suit by the plaintiff by the mortgagor, namely that the mortgagor

shall, during the subsistence of the security, pay all rents, royalty, cesses, taxes, rates assessments and impositions which now are or hereafter may be payable in respect of the said premises....

7. These covenants mentioned above contained in the mortgage must be taken into consideration for the purpose of arriving at the decision that the mortgage was an English mortgage as contemplated by Section 58(e), T.P. Act. The document Ex. 2 in the case under which defendants 5 and 6 claim, has to be considered next. In this mortgage there was no covenant for repayment on a certain date, and one of the three essentials of an English mortgage was therefore undoubtedly wanting. There were, of course, words used in the document supporting the position that there was an absolute transfer by the mortgagor and a provision for retransfer to the mortgagee. There was the definite stipulation for payment of rent and royalty by the mortgagor, contained in these words:

He the mortgagor shall and will as long as money shall remain due and owing on the security of these presents, regularly and in due course pay the rates and royalty reserved by and shall duly observe and perform the several covenants and conditions contained in the hereinbefore recited Potta or lease.

8. On the position indicated by the provisions contained in the document Ex. 2 the question has to be decided whether it was an English mortgage as

contemplated by law applicable to this country. There can be no question that the provisions contained in the documents referred to above are not such as could lead to the conclusion that the transaction evidenced by the same were an English mortgage as contemplated by Section 58(e), T.P. Act. The intention of the parties concerned has to be gathered from the documents as they stand, taking all the provisions contained in the same, together. As it has been said the real nature of a transaction must always be carefully looked into as the mere form of the instrument is a very delusive guide. In construing documents which, according to the plaintiff in the suit the respondent in this Court, purport to impose liabilities of a very onerous nature on one party to the same, the appellants, the covenant on which such liability is based must be strictly construed, and effect should be given to all the parts of the document.

9. In view of the above rules of construction it is not possible to hold that the mortgages evidenced by the documents, Ex. 2 and 5 in the case, were such mortgages or transfers with reference to which it could be held that the mortgagees who were not in possession of the mortgaged premises were liable to satisfy the claim for rent or royalty as made by the plaintiff in the case before us. The decision of this Court, in *Bengal National Bank Ltd. v. Janaki Nath Ray* 1927 Cal 725, relied upon by the Court, below, and on which very strong reliance was placed in support of the case for the plaintiff respondent, in this Court can have no application regard being had to the provisions contained in the documents Exs. 2 and 5 and to the facts of the case before us. In the case before us, the mortgages are not English mortgages; the mortgagor covenanted with the mortgagees for payment of rent and royalties. There was the express covenant in the mortgages for payment of rent and royalty by the mortgagors; and no liability could be imposed upon the defendants Nos. 5, 6 and 7 on the authority of the decision in *Bengal National Bank Ltd. v. Janaki Nath Ray* 1927 Cal 725, referred to above, and on no other basis whatsoever, as the finding as to possession of the mortgaged property as indicated in the judgment of the Court below, was not supported by the plaintiff respondent in this Court on the evidence in the case.

10. The conclusion arrived at as indicated above is that the mortgages evidenced by the documents, Exs. 2 and 5 in the case, were not English mortgages as contemplated by Section 58(e), T.P. Act, and that liability for rent or royalty as claimed in the suit could not be fixed on the contesting defendants 2, 5, 6 and 7, the appellants in this Court, on the basis of those mortgages or any other basis, regard being had to the provisions contained in those mortgages. The appeals must be allowed and the plaintiff's suit so far as it related to claim against the defendants 2, 5, 6 and 7 must be dismissed. It may be mentioned that in support of the appeals to this Court some other questions were submitted for our consideration. It is not necessary for the purposes of these appeals to go into these questions; but it may be mentioned that so far the question whether the settlement which was the subject of the mortgages evidenced by documents Ex. 2 and 5 was a lease or not, the question whether an assignment of a lease by

way of an English mortgage did or did not by itself create a liability on the mortgagee in respect of royalty as fixed by the lease, are concerned, I do not see any reason to differ from the definite expression of opinion as contained in the judgment of this Court in *Fala Krista Pal v. Jagannath, Marwari* 1932 Cal 775.

11. In the result, the appeals are allowed; the decision and the decree passed by the Court below on 20th April 1931, so far as they fix any liability on defendants 2, 5, 6 and 7 in the suit out of which these appeals have arisen, are set aside; and the plaintiff's claim in suit so far as it related to the liability of these defendants is disallowed, the suit being dismissed so far as these four defendants are concerned. The defendants appellants in this Court are entitled to get their costs in the litigation, including the costs in these appeals from the plaintiff-respondent.

Lodge, J.

12. I agree. The only question for our decision is whether defendants 2, 5, 6 and 7 are liable as mortgagees for the arrears of royalty, cesses and price of coal. It was conceded by the advocate for the respondent that these defendants were never in possession of the colliery in the period for which arrears are claimed. The suit was decreed against defendants 2, 5, 6 and 7 on the ground that the mortgages in favour of Jogendra Lal Mukherji and Satya Charan Srimani were English mortgages as defined in Section 58(e), T.P. Act.

13. The Subordinate Judge, relying on *Bengal National Bank Ltd. v. Janaki Nath Ray* 1927 Cal 725, held that the mortgagees were liable for the arrears irrespective of any question of possession. The advocates for the appellants have argued firstly that the mortgages in question are not English mortgages as defined in Section 58(e), T.P. Act, and secondly that even if they are English mortgages as so denied, the mortgagees, not being mortgagees in possession, are not liable for arrears of royalty, cess, etc. The advocate for the respondent has argued that the mortgages are English mortgages; and that in consequence the mortgagees and transferees from the mortgagees are liable for arrears of Royalty Cess, etc., irrespective of any question. The doctrine that the mortgagee of a leasehold property under an English mortgage is liable for the rent, whether he enters into possession of the property or not, is derived from the Transfer of Property Act and from the decision in *Bengal National Bank Ltd. v. Janaki Nath Ray* 1927 Cal 725. In that case Rankin, C.J., adopted the reasoning of Dallas, C.J., in *Williams v. Bosanquet* (1819) 1 Br & B 238, which runs as follows:

The assignment of a lease for the whole term, whether absolute or subject to a proviso for reassignment in a certain event, is as far as concerns the interest to be transferred precisely the same; and the assignment, as in the present case, is of all the right, title and interest of the assignor in the lease assigned. So completely does the interest pass from the one and vest in the other, that there is a covenant to reassign when the money shall be repaid. The whole interest is therefore assigned, and the whole is to be reassigned. It vests in them

absolutely, till such reassignment, in the party who is to reassign, and is not less absolute, because by agreement between the immediate parties, to which the lessor is no party, the assignor may, in any event which may or may not happen, entitle himself to a reconveyance by the money being repaid.

14. Rankin, C.J., held that reasoning is equally valid in India, and that in India the lessor parts with his "whole estate under an English mortgage." These are essentials of an English mortgage as defined in Section 58(e), T.P. Act, viz: (1) that the mortgagor binds himself to repay the mortgage money on a certain date; (2) that the property mortgaged is transferred absolutely to the mortgagee; and (3) that such absolute transfer is made subject to a proviso that the mortgagee will reconvey the property to the mortgagor upon payment by him of the mortgage-money as agreed. The reasoning of Dallas, C.J., in *Williams v. Bosanquet* (1819) 1 Br & B 238, quoted above, is based on the second and third of these essentials and would apply equally to anomalous mortgages which possessed these two features. It is not necessary therefore for us to determine whether the mortgages in question are English mortgages as defined in Section 58(e). We have merely to decide whether by these mortgages, the whole of the right, title and interest of the mortgagor in the property so mortgaged passed to the mortgagees by virtue of the transaction.

15. The advocates for the appellants have contended that in view of the provisions of the Transfer of Property Act, and in view of the covenants in the two mortgages, the whole of the right, title and interest of the mortgagor in the property mortgaged did not pass to the mortgagees. It was argued that the definition of a mortgage in the Act, and the provisions of the Act as to the rights and liabilities of mortgagor and mortgagee are wholly inconsistent with the view that the whole of the right, title and interest of the mortgagor passes to the mortgagee. It was contended that in no mortgage in British India, to which the provisions of the Transfer of Property Act applies does ownership of the property pass to the mortgagee. It is unnecessary in the present case to determine so general a question. In 36 CWN 709(2) another Bench of this Court, of which one of us was a member, found great difficulty in applying the reasoning of Rankin, C.J., in 31 CWN 973(1), in its entirety, to mortgages in British India, and pointed out that in view of the other provisions of the Transfer of Property Act, an English mortgage in India can hardly be regarded as a transfer of the entire estate of the mortgagor to the mortgagee in spite of the definition of an English mortgage in Section 58(e) of the Act. We share the doubt expressed in 36 C.W.N 709 (2), and the arguments placed before us have served rather to strengthen than to remove that doubt.

16. In the present case however the express covenants in the two mortgages seem to us inconsistent with an absolute transfer of the whole interest of the mortgagor to the mortgagees. The mortgage-deed, with which the appellant in Appeal No. 212 is concerned, is Ex. 5 of the lower Court's record. It is true that the deed in question purports to grant, convey and assure to the mortgagee and

to his use for ever the entire interest of the mortgagor in the eight annas share of the property of the sublease subject to a proviso that if the mortgagor shall on 18th May 1928 repay to the mortgagee the dues of the latter under the deed the mortgagee will re-convey, retransfer and reassign the said mortgaged premises to the mortgagor. But the same document also provided that the mortgagor shall be liable to pay the rents and royalties and that it shall be lawful for but not obligatory upon the mortgagee to pay and deposit the same in case of default by the mortgagor. It also provided that if the mortgagor pays the interest on the loan regularly on the day and in the manner agreed upon, the mortgagee shall not recall the mortgage money until 18th May 1933. It further provides that the mortgagor will be entitled to remain in possession of the mortgaged premises and to carry on colliery business therein. In view of these provisions, it seems to us impossible to hold that the whole of the right, title and interest of the mortgagor in the property; passed to the mortgagee by virtue of the mortgage.

17. Similarly in Ex. 2, the mortgage-deed, with which Appeal No. 218 is concerned, it is agreed that the mortgagor shall remain in possession of the mortgaged property and be entitled to work a colliery therein; and that he shall be liable to pay rents and royalties, and that it shall be lawful but not obligatory upon the mortgagee to pay rents and royalties in case of default of payment by the mortgagor. We are of opinion in this case also that the whole of the right, title and interest of the mortgagor did not pass to the mortgagee by virtue of the mortgage. I agree therefore that the appeals must be allowed.