

APPELLATE CIVIL.

Before R. C. Mitter J.

1936

June 12, 16, 26.

COHEN

v.

BAIDYA NATH MUKHERJI.*

Mortgage—English mortgage, if converted to anomalous mortgage by insertion of certain undertakings of mortgagor—Effect of introduction of s. 69A in Transfer of Property Act—Time for requisition—Trustees and Mortgagees Powers Act (XXVIII of 1866), s. 12—Transfer of Property Act (IV of 1882), ss. 58, 69A, 98.

Where an English mortgage deed as defined by s. 58 of the Transfer of Property Act, 1882, contained *inter alia* clauses whereby the mortgagor was empowered to pay rates and taxes of the mortgaged premises, to substitute with the mortgagee's consent other properties as security for the mortgagee's dues, to sell any portion of the mortgaged properties, provided the sale-proceeds, less brokerage, was paid to the mortgagee,

held that such provisions do not make the said deed an anomalous mortgage.

Falakrishna Pal v. Jagannath Marwari (1) and *Satya Priya Ghoshal v. Barid Baran Mukherji* (2) followed.

Section 69A introduced into the Transfer of Property Act of 1882 by Act XX of 1929 has not repealed s. 12 of the Trustees and Mortgagees Powers Act, 1866, the effect of the amendment being that the last mentioned section is not deemed to be incorporated in an English mortgage, *proprio vigore* executed after the amending Act came into force.

The period of ten days mentioned in s. 12 of the Trustees and Mortgagees Powers Act, 1866, is to be counted from the date of delivery of the letter of requisition to the person entitled to the property subject to the charge, and not from the date of the said letter.

SECOND APPEAL by the plaintiff.

The material facts and the arguments in the appeal appear in the judgment.

Carden Noad, Jateendra Mohan Chaudhuri and *Rabeendra Nath Chaudhuri* for the appellants.

*Appeal from Appellate Decree, No. 823 of 1935, against the decree of T. H. Ellis, District Judge of 24-Parganás, dated April 30, 1935, reversing the decree of Rabeendra Kumar Basu, Second Munsif of Alipore, dated Jan. 24, 1935.

(1) (1932) I. L. R. 59 Cal. 1314.

(2) (1936) I. L. R. 63 Cal. 1123.

1936
 Cohen
 v.
 Baidya Nath
 Mukherji.

Bijan Kumar Mukherjea, Pramode Kumar Ray and Bhupendra Nath Das Gupta (jr.) for the first respondent.

Someshwar Prasad Mukherji Anulya Chandra Sen and Amod Chandra Sen for the second respondent.

Cur. adv. vult.

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), Bâliganj Circular Road, which comprised an area of 10 *bighás*, 10 *cottás*, 13 *chhittáks* with buildings, orginally belonged to Miss Mary Jones. She had mortgaged the same to the Administrator-General of Bengal, who is the executor to the estate of Sagar Datta, deceased. She sold the said premises, subject to the said mortgage to the appellant. The appellant executed on July 27, 1928, a mortgage in favour of her of the said premises for a sum of rupees one lakh. 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 release 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. In pursuance of this right reserved to the mortgagor, the appellant has sold about 7 *bighás* 2 *cottás* odd land out of the mortgaged premises, and the remaining area of about 3 *bighás* 8 *cottás* 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 February 12, 1926, appointed, under the provisions of s. 12 of the Trustees and Mortgagees Powers Act, the respondent No. 1, Mr. Baidya Nath Mukherji, a pleader of Alipore, receiver on June 16, 1933. This gentleman 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 for restraining Mr. Mukherji from taking possession of the mortgaged premises or from realising rent or from disturbing the appellant's possession.

1936
 Cohen
 v.
 Baidya Nath
 Mukherji.
 B. C. Mitter J.

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. Mukherji by the mortgagee as receiver is invalid;

(ii) even if the mortgage is an English mortgage, the Court can only appoint a receiver, s. 69A, added to the Transfer of Property Act by Act XX of 1929, having abrogated s. 12 of the Trustees and Mortgagees Powers Act;

(iii) the appointment of a receiver could not be made at the time at which it was 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 s. 12 of the Trustees and Mortgagees Powers Act have not been complied with, as Mr. Mukherji 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

1936

Cohen

v.

Baidya Nath
Mukherji.R. G. Mitter J.

(v) Mr. Deveria had no power under the terms of his power-of-attorney to appoint the receiver.

Besides meeting the points raised by the appellant's counsel, Dr. Mukherjea appearing on behalf of respondent No. 1 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 s. 98 of the Transfer of Property 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 unnecessary to deal with this further point raised by Dr. Mukherjea, 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. The mortgagor admits receipt of one lakh of rupees and promises to repay it with interest on July 27, 1938. He expressly conveys No. 57, Bâliganj 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 properties. 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 his 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 is 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 July 27, 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—

1936

Cohen

v.

Baidya Nath
Mukherji.R. O. Mitter J.

“the power of sale and provisions ancillary or auxiliary thereto conferred upon the mortgagee by the said Act or by ss. 6 to 19 inclusive of Act XXVIII of 1866 (India Council) 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 XXVIII of 1866, India Council) 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 lakh or any part thereof or any other money that may become for the time being due and payable together with interest, if any, thereon on July 27, 1938, or at any other time when the same may become due and/or payable.”

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 revested in the mortgagor by the act of reconveyance by the mortgagee. In support of his contention he relies upon the cases of

1936

Cohen

v.

Baidya Nath
Mukherji.

R. C. Mitter J.

Satya Charan Srimani v. Ramkinkar Banerjee (1)
and *Narayana Ayyar v. Venkantaramana Ayyar* (2).
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 reconveyance 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 reconveyance, and on sale of portions of the mortgaged premises, the same is to be released by the mortgagee on fulfilment of certain conditions but also through such a reconveyance. 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 not 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 s. 58 of the Transfer of Property 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

(1) (1935) 62 C. L. J. 28.

(2) (1902) I. L. R. 25 Mad. 220.

to the mortgagee. In determining such questions, in my view, cl. (a) of s. 58 of the Transfer of Property Act cannot be ignored. The view I am taking is supported by two decisions of the Division Bench, namely, in *Falakrishna Pal v. Jagannath Marwari* (1) and *Satya Priya Ghoshal v. Barid Baran Mukherji* (2). In the case of *Satya Charan Srimani v. Ram Kinkar Banerjee* (3) the learned Judges were also inclined to follow *Falakrishna Pal's* case (1) and although one of the learned Judges (Guha J.) relied upon the fact that the mortgagor undertook to pay rents and royalties for coming to the conclusion that one of the mortgages was not an English mortgage, but the other learned Judge (Lodge 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.

I, accordingly, hold that the mortgage, which the appellant executed in favour of Miss Mary Jones, is an English mortgage. By the terms of s. 69 of the Transfer of Property Act (before amendment), and by the contract between the parties also, s. 12 of the Trustees and Mortgagees Powers Act has been incorporated in this mortgage. In my judgment, s. 69A introduced into the Transfer of Property Act by Act XX of 1929 (India Council) has not repealed or modified that section, namely, s. 12 of Act XXVIII of 1866, but the only effect of the amendment in my judgment is that s. 12 of Act XXVIII 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 terms

1936
 Cohen
 v.
*Baidya Nath
 Mukherji.*
 R. C. Mitter J.

(1) (1932) I. L. R. 59 Cal. 1314. (2) (1936) I. L. R. 63 Cal 1123.

(3) (1935) 62 C. L. J. 28.

1936
 Cohen
 v.
 Baidya Nath
 Mukherji.
 R. C. Mitter J.

and conditions introduced into the deed by virtue of s. 69 of the Transfer of Property 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 XX of 1929 by which the last paragraph of the original s. 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 No. 1 as receiver. As I construe the mortgage instrument the power of sale could not be exercised before July 27, 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.

Regarding the fourth point, the facts are these: Mr. Deveria wrote a letter to the appellant on June 2, 1933, requiring him to nominate a person as receiver. The appellant received the letter on June 6, 1933, and did not nominate a person as receiver. Mr. Deveria appointed respondent No. 1 as receiver on June 16, 1933. The learned District Judge has held that the period of ten days mentioned in s. 12 of Act XXVIII 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 ten days to make his choice. But I do not think that the appointment made on June 16, 1933, is invalid, because, in my judgment, the mortgagor has by his contract as embodied in the mortgage is not entitled to ten days time as provided for in s. 12. The words there are to this effect: "but without restriction in the last-mentioned Act (Act XXVIII of 1866) contained as to giving notice" in

my judgment is sufficiently comprehensive. I, accordingly, overrule the fourth point also urged on behalf of the appellant.

1936
Cohen
v.
Baidya Nath
Mukherji.
R. C. Mitter J.

Regarding the last point I hold that under cl. (2) of the power-of-attorney which Mr. Deveria held from Miss Jones he could exercise the powers he has exercised in this case. The attorney is given the power "to execute or enforce powers of sale or other rights, "powers 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, on 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 No. 1 is the receiver in respect of that portion of premises No. 57, Bâliganj Road which is still under mortgage.

Leave to appeal under s. 15 of the Letters Patent is refused.

A.K.D.

Appeal dismissed.