APPELLATE CIVIL.

Before Sir Guy Rutledge, Kt., K.C., Chief Justice, and Mr. Justice Brown.

THE OFFICIAL ASSIGNEE, RANGOON
v.
R.M.P.V.M. FIRM.*

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Agent's duty towards principal—Mortgagee's position as agent—Mortgagee, when may purchase mortgagor's property—Mortgagee, when on an equal footing with a stranger—Unfair and special use of knowledge acquired as mortgagee, vitiates purchase—Agent's purchase outside the business of agency—Mortgagor's claim for benefit obtained by mortgagee—Contract Act (IX of 1872), *ss.* 215, 216.

An agent will not be allowed to place himself in a situation which, under ordinary circumstances, would tempt a man to do that which is not the best for his principal.

Barker v. *Harrison*, 63 Eng. Rep. 854 ; *Bentley* v. *Craven*, 52 Eng. Rep. 29 ; *Dally* v. *Wonham*, 55 Eng. Rep. 326 ; *Hesse* v. *Briant*, 43 Eng. Rep. 1375 ; *Mollett* v. *Robinson*, L.R. 5 C.P. Cases 646—*referred to.*

This principle has been applied in cases of mortgagees' dealings with the mortgaged property.

Hobday v. *Peters*, 4 Eng. Rep. 400 ; *Rajah Kishendatt* v. *Rajah Mumtaz*, 6 I.A. 145 ; *White* v. *City of London Brewery Company*, 39 Ch.Div. 559—*referred to.*

But where a mortgagee does not derive from his mortgagor any peculiar means or facilities for making a purchase which would not be available to a stranger, he may be held entitled, equally with a stranger, to make it for his own benefit. So where the respondents, who were mortgagees in possession, purchased the mortgaged property which was brought to sale under a mortgage which was subsequent to theirs and with which they had no connection whatsoever, they were in fact purchasing the equity of redemption of their own mortgage at a fair price. In doing so, they were not making any unfair and special use of any knowledge which was acquired by them as mortgagees in possession and which was not accessible to any stranger who had made a proper search. The respondents were not only mortgagees in possession but held a power of attorney from the mortgagor enabling them to manage and sell the property. But in purchasing the property they were neither using nor acting under their power as agents, and were not dealing in the business of the agency at all, and the mortgagor could not therefore invoke the provisions of ss. 215 and 216 of the Contract Act and claim from them the advantages of the purchase.

Leach for the appellant.
Paget for the respondents.

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* Civil First Appeal No. 222 of 1928 against the judgment on the original Side in Civil Regular No. 478 of 1927.

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RUTLEDGE, C.J., and BROWN, J.—The appellant the Official Assignee brought a suit against the respondents, the R.M.P.V.M. Chettyar Firm, for a declaration that the insolvent's estate which the appellant represents is entitled to the benefit of certain transactions entered into by the defendants. The insolvent is one Ahmed Ismail Hashim Atchia. On the 1st of June 1919 he took a lease of certain land from the Goolam Ariff Estate Company, Limited, for a term of ten years, one condition in the lease being that he should erect thereon a substantial building costing not less than Rs. 50,000 to Rs. 75,000. Atchia erected buildings on the land at a cost of Rs. 1,31,000 and used the same for the purposes of a cinema known as "The Royal Cinema." In January 1921 Atchia mortgaged the Royal Cinema and his enterests under the lease to the Company for the sum of Rs. 60,000. He subsequently repaid Rs. 45,000 of this debt, but on the 9th of September 1922 he executed a further mortgage for the balance of Rs. 15,000 due on the earlier mortgage and for a further sum of Rs. 30,000, Meanwhile on the 13th of June 1922 Atchia had executed a mortgage in favour of the Chettyar Firm. The property then mortgaged included the Royal Cinema, which had been previously mortgaged to the Company, and also the Cinema de Paris, another property of Atchia's. On the 20th of April 1923 Atchia executed a further mortgage for Rs. 1,00,000. This mortgagee was in favour of his brother-in-law. Ebrahim Ismail Ghanchee and included the Royal Cinema, the Cinema de Paris and other assets of the film agency business and a printing press. On the 27th of September 1923 Atchia executed a deed whereby he handed over the management of the Royal Cinema to the Chettyar Firm. Ghanchee was a party to this deed. The Chettyar Firm was empowered to

utilize the profits, first for the payment of interest due to them by Atchia, and secondly for payment of the principal sum due. It gave the Chettyar Firm a general power to collect moneys due to Atchia and in the event of the bioscope shows not being profitable it gave the Chettyar Firm power to sell the same. On the same date a deed was executed whereby Ghanchee agreed to treat the Chettyar Firm as co-mortgagees on his mortgage for Rs. 1,00,000 to secure Rs. 50,000 of the sum of Rs. 70,000 due by Atchia to the Firm on unsecured debts. Atchia then left Rangoon about December 1923 for the Andaman Islands and save for one short interval did not return until July 1924.

The management of the Royal Cinema was left entirely in the hands of the Firm. Before Atchia left for the Andamans he received a notice from the Goolam Ariff Estate Company calling upon him to pay up the principal sum of Rs. 45,000 due on the mortgage of the 9th September 1922, failing payment of which the Company would take steps to recover the amount. Atchia asked for further time but this was refused, the Company stating that unless the money was paid they would take immediate steps to realize their securities. The Company appear to have taken no further steps until about May 1924 when they advertised the properties for sale under the power given in their mortgage deed of September 1922.

The Chettyar Firm advised Atchia both by letter and by telegram that the Company were pressing for their money, urging him to come to Rangoon at once, or if that were impossible to empower some one to act on his behalf. Atchia did not come to Rangoon till the beginning of July or empower any one to act for him. In the meantime the Royal Cinema was sold by auction under the power of sale in the mortgage-

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deed on the 21st of June 1924 and purchased by the defendant firm for Rs. 65,000. Rs. 45,000 of this sum was paid to the Company in settlement of their debts, and the balance after allowing for the costs of the sale was utilized towards the mortgage debt due to the Chettyar Firm.

On the 17th of July the Chettyar Firm obtained a new lease of the site of the Royal Cinema for a period of 16 years from the Company, and on the 25th of July they leased the Cinema to Madan Theatres, Limited, at a monthly rental of Rs. 2,150. Meanwhile on the 2nd of July 1924 Ghanchee assigned to the defendant firm the whole of the debt of Rs. 1,00,000 due to him on his mortgage deed for the sum of Rs. 15,000.

The plaintiff claims that in these circumstances the Chettyar Firm must be treated as Atchia's agents and that Atchia is entitled to the benefit both of the purchase of the Royal Cinema and of the assignment of his mortgage by Ghanchee. The claim is based in part on the fact that the Chettyar Firm were mortgagees in possession and in part on the fact that they were the agents of Atchia. The learned trial Judge held that the plaintiff had not established his case, and except with regard to a sum of Rs. 2,500 given by Atchia as a deposit on taking the lease from the Goolam Ariff Estate Company in 1919, as to which there was no real dispute, he has dismissed the plaintiff's suit. The plaintiff has now appealed against this decision.

We have been referred to a number of English cases in which the acts of mortgagees in possession or of agents have been held to have been performed on behalf of their principal and to be acts for the benefit of which they were bound to account to their mortgagor or principal. In the case of *Hobday* v. *Peters* (1), a solicitor's clerk had been giving a client

(1) 84 Eng. Rep. 400.

his advice and with the help of the knowledge obtained by him in connection with this advice he purchased the mortgage granted by the client for less than half the amount. It was held with regard to this purchase that he was a trustee for the benefit for the mortgagor. In the case of *White* v. *City of London Brewery Company* (1), the mortgagees in possession of a public house let the premises with a restriction that the tenant should take beer of their brewing and none other. It was held that they must account for such additional rent as might have been got if the premises had been let without restriction. In the case of *Rajah Kishendatt Ram* v. *Rajah Mumtaz Ali Khan* (2), the mortgagee had purchased after his mortgage certain encumbrances on the property mortgaged. It was held in the circumstances of that case that the mortgagor was entitled to redeem the whole estate on paying the original mortgage money *plus* the money used for the purchase of the encumbrances. The circumstances of that case were somewhat peculiar and not analogous to those of the case now before us. The principle followed appears to have been that in that case the mortgagee by virtue of his possession had acquired a peculiar means of making the purchase, and in the course of their judgment their Lordships referred to cases in which purchases made by the mortgagee in possession might not be held to be advantageous to the mortgagor. On page 153 of their judgment they remark : "In such cases the mortgagee can hardly be said to have derived from his mortgagor any peculiar means or facilities for making the purchase which would not be possessed by a stranger, and may therefore be held entitled, equally with a stranger, to make it for his own benefit." In the

(1) 39 Ch. Div. 559. (2) 16 I.A. 145.

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case of *Mollett* v. *Robinson* (1), Willes, J., remarks at page 655 of the judgment "it is an axiom of the law of principal and agent that a broker employed to sell cannot himself become the buyer, nor can a broker employed to buy become himself the seller, without distinct notice to the principal". This general rule was approved in the case of *Bentley* v. *Craven* (2). At page 30 the Master of the Rolls remarked with regard to this rule, "it is founded on this principle, that an agent will not be allowed to place himself in a situation which, under ordinary circumstances, would tempt a man to do that which is not the best for his principal, and it is the plain duty of every agent to do the best he can for his principal." In the case of *Dally* v. *Wonham* (3) the purchase by an agent for inadequate price was set aside. In that case the purchaser resided on the spot and was fully acquainted with the value of the property, whereas the vendor lived at a distance and had not seen the property for 20 years. In the case of *Hesse* v. *Briant* (4), specific performance was refused of an agreement entered into to sell a propety between two persons, where the same solicitor acted for both parties. In the case of *Barker* v. *Harrison* (5), an agent who had purchased lands of his principal, and who, previously to contract, had entered into a secret negotiation for a resale of part of the property at a profit, was declared a trustee for his principal to the extent of that profit.

None of these cases seems to us to be very similar to the case which we have to decide. The Chettyar Firm were in possession of the property which they purchased as mortgagees. But it seems to us impossible to hold that their possession as mortgagees gave

(1) L.R. 5 P.C. Cases 646.
(2) 52 Eng. Rep. 29.
(3) 55 Eng. Rep. 326.
(4) 43 Eng. Rep. 1375.
(5) 63 Eng. Rep. 854.

them any peculiar means or facilities for making the purchase of the property brought to sale under a subsequent mortgage with which they had nothing whatever to do. They had, it is true, special means of knowing the nature of the property, but it does not appear that there were encumbrances on the property which any stranger with due diligence and due searching at the Registration Office might not have known. In informing Atchia of the intention of the Goolam Ariff Estate Comyany the Chettyar Firm said nothing whatever about the sale of the property under the power of sale in the mortgage deed. But they did quite clearly urge Atchia to come to Rangoon without delay, and before he left for the Andamans Atchia had received full notice that the Company were likely to exercise their power. The sale of the property took place at a public auction, and presumably if the Chettyar Firm had not purchased it would have been purchased by somebody else at a still lower price.

The deed by which the Company executed the conveyance in favour of the Chettyar Firm is a somewhat curious one. The sale was under the power of sale in the mortgage deed subsequent to the date of the Chettyar's mortgage. Quite clearly therefore the sale could not affect the Chettyar's mortgage in any way and what was in fact sold was the equity of redemption of this mortgage from the Chettyar. Nevertheless the sale deed says that Rs. 20,000 should be utilized towards the settlement of this mortgage. Be that as it may, we do not think it can be held that in making the purchase under the power of sale the Chettyar Firm were making an unfair and special use of the knowledge acquired by them as mortgagees in possession. In actual fact they purchased only the equity of redemption of their own mortgage amounting to Rs. 50,000 and Rs. 65,000 was not so inadequate

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a price as it might at first sight appear. The deed giving management of the Cinema to the Chettyar Firm not only put them as mortgagees in possession but also empowered them as agents. It gave them power in certain circumstances to sell the property. But we do not think that the cases cited to us are authorities for the contention that in these circumstances a sale by them must be held to have been for the benefit of their principal. The sales in all the cases cited were sales by or to the agent when he was clearly exercising the power of his agency. In the present case it is perfectly clear that in making the purchase the Chettyar Firm was in no way acting or purporting to act under their power as agents. The sale was effected not by Atchia and not by the Chettyar Firm but by the Goolam Ariff Estate Company which had acquired this power of sale long before the Chettyar Firm had been appointed agents.

The principles of the English law on this subject are incorporated in sections 215 and 216 of the Indian Contract Act. Section 216 lays down that if an agent, without the knowledge of his principal, deals in the business of the agency on his own account instead of an account of his principal, the principal is entitled to claim from the agent any benefit which may have resulted to him from the transaction. It seems to us impossible in the present case to hold that the Chettyar Firm in purchasing at a sale held under the power given to the Goolam Ariff Estate Company long before the firm became the agent was dealing in the business of the agency at all. As agents they had no power either to make the sale under the power in the mortgage-deed or to stop it. It seems to us therefore that the principles of this section do not apply to the present case and that the appellant cannot claim the advantages of the sale on behalf of

the estate of Atchia. Nor can we see sufficient reason for holding that the Chettyar Firm is not entitled to the full benefit of its purchase from Ghanchee of the debt due to him. It is true that the Chettyar Firm was in a fiduciary position in regard to a part of the property to which the mortgage for Rs. 1,00,000 referred. But it does not seem to us that in purchasing this debt the Firm made any special use of the knowledge obtained thereon in such capacity. The general rule undoubtedly is that if one person buys the debts of another for less than their face value, he is entitled to claim for the whole debt. We are unable to see any sufficient circumstance in the present case to bring it outside the ordinary rule.

There are undoubtedly in this case many circumstances which strongly suggest collusion between the Chettyar Firm and the Goolam Ariff Estate Company. But, as pointed out by the learned trial Judge, there is no reference to collusion in the plaint, and we are not prepared in the circumstances to differ from his view that collusion is not established. The trial Court whilst dismissing the main part of the plaintiff's claim passed a decree in his favour for the sum of Rs. 2,400. This was the sum originally deposited with the Goolam Ariff Estate Company by Atchia when taking out his original lease in 1919. By taking a fresh lease in their favour the Chettyar Firm obtained the advantage of this deposit and they are admittedly bound to account to the Official Assignee for this sum. No complaint can therefore be made as to the decree of the trial Court in favour of the plaintiff for this sum. The defendants, however, have filed a cross-objection on the matter of costs. The trial Judge directed that the parties should respectively pay their own costs on the ground that the plaintiff had succeeded in part and failed in part. On this point it

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is urged that the amount of Rs 2,400 for which a decree was passed in favour of the plaintiff was a small sum compared with the Rs. 20,000 at which he valued his main claim; and further that there never really was any dispute as regards this Rs. 2,400 and that therefore no litigation with regard to it was ever necessary. There is some force in this contention, but we are nevertheless not satisfied that there is sufficient ground for interfering with the discretion of the trial Court in the matter of costs. We have held that the Official Assignee has not established the main part of his case. But the actions of the Chettyar Firm in dealing with the property and the debts have been of such a nature as necessarily to arouse doubt and suspicion in the mind of the Official Assignee, and we are of opinion that the Chettyar Firm must be held largely responsible for he bringing of this action. The result is that we dismiss both the appeal and the cross-objection with costs.

APPELLATE CIVIL.

Before Sir Guy Rutledge, Kt., K.C., Chief Justice and Mr. Justice Brown.

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E. M. JOSEPH AND OTHERS
v.
SAMSUNDER AND OTHERS.*

Registration Act (*XVI of* 1908), *ss.* 2 (*vii*), 17 (1) (*d*), 17 (2) (*v*)—*Agreement to lease, what is—Unilateral letter embodying proposals not a lease—Proposal in writing to grant lease must be accepted in writing, to constitute "agreement to lease"—Document giving right to obtain another document.*

Respondent-plaintiffs were tenants occupying three rooms in appellants' house. They were sued for ejectment, but they came to an arrangement whereby the respondents were to continue in occupation of the rooms for the rest of their lives on payment of a daily rent and of a lump sum as *salami*

* Civil First Appeals Nos. 207 to 209 of 1928 against the judgment of the Original Side in Civil Regular Nos. 353, 398 and 399 of 1927.