

APPELLATE CIVIL.

Before Mr. Justice Mya Bu.

U SAN AND ANOTHER

v.

MAUNG SEIN.*

1936

Feb. 26.

Mortgage—Anomalous mortgage—Personal liability to repay loan—Nature and terms of the transaction—Promise to redeem when required by the mortgagee—Implied promise to repay personally—Transfer of Property Act (IV of 1882 and XX of 1929), s. 58 (g).

Whether there is any personal liability on the mortgagor in an anomalous mortgage to repay the loan depends on the terms, of the bond and the nature of the transaction between the parties.

Gupta v. The Administrator-General of Burma, I.L.R. 5 Ran. 558; *Pars Ram v. Brij Mohan Lal*, I.L.R. 13 Lah. 259; *Ram Narayan v. A. N. Mukherji*, I.L.R. 44 Cal. 388—*referred to*.

In respect of a loan the borrower mortgaged his lands with possession to the lenders. He stated in the bond "I shall redeem them if the mortgagees want me to redeem them." Later he borrowed a further sum from the lenders on the mortgage of the same properties and stated in the bond "Regarding the said lands, I agree to be held responsible in accordance with the terms of the original deed, and at the time of redemption, I shall redeem them (by payment of) the original mortgage sum and the further sum." The mortgagees filed a suit against the borrower and eventually got the mortgage lands sold. The sale proceeds were insufficient to satisfy the debt, and so they applied for a personal decree for the balance.

Held, that the mortgage was an anomalous one, and that there was an implied personal covenant on the part of the borrower to repay the loan and the mortgagees were, subject to limitation, entitled to a personal decree.

Luchmeshwar Singh v. Dookh Mochan, I.L.R. 24 Cal. 677; *Nagar Damodara v. Chandappa*, I.L.R. 56 Mad. 892; *Narotam Das v. Sheo Pargash Singh*, I.L.R. 10 Cal. 740—*distinguished*.

A. N. Basu for the appellants.

K. C. Sanyal for the respondent.

MYA BU, J.—This is an appeal from an order refusing to pass a personal decree in a mortgage suit. The suit was for recovery of the principal sum

* Civil Second Appeal No. 306 of 1935 from the judgment of the District Court of Sagaing in Civil Appeal No. 27 of 1935.

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due on the mortgage and for a decree for sale of the mortgaged property in the event of the defendant failing to pay the same within the time allowed by the Court and for a personal decree for the balance in the event of the net sale proceeds being found insufficient to pay up the decretal amount. The mortgagees filed this suit on the 10th May, 1934. The mortgages relied on were created by two registered mortgage deeds of one and the same holding of paddy land dated the 11th May, 1926, and 6th December, 1927, for Rs. 1,500 and Rs. 500 respectively. In the first of these deeds it is stated that the mortgagor said :

" Please accept in mortgage with possession for Rs. 1,500 for a term of three years my paddy and ya lands, * * * * *. I shall redeem them if the mortgagees want me to redeem them."

In the second deed it is stated that the mortgagor who took the further loan said to the mortgagees :

" Please pay me a further sum of Rs. 500 on the paddy and ya lands, which were mortgaged under a registered deed of the 11th May, 1926, * * * for three years from the date of payment of this further sum. Regarding the said lands, I agree to be held responsible in accordance with the terms of the original deed, and at the time of redemption, I shall redeem them (by payment of), the original mortgage sum and the further sum."

The plaint set out, *inter alia*, that the mortgage in each case was one with possession for three years ; that the mortgagor undertook to redeem the property when the mortgagees required redemption to be made ; and that in spite of demands, the last of which was by means of a lawyer's notice, the mortgagee failed to redeem. The mortgagor filed a written statement admitting all the allegations in the

plaint but submitting that the plaintiffs were not entitled to a personal decree against the defendant as the plaintiffs' claim to a personal decree is barred under the Law of Limitation, and there was no personal covenant to pay. The contest between the parties has, so far, centred around the point whether there was any personal covenant on the part of the mortgagees to pay the mortgage debt. After having filed this written statement a preliminary decree was passed as in an ordinary mortgage suit for sale. The defendant having failed to pay the amount mentioned in the preliminary decree within the time allowed therein, the plaintiffs applied for a final decree which was granted in due course. The net sale proceeds under the final decree being insufficient to fully satisfy the decretal amount, the plaintiffs applied for a personal decree for the balance. The Court of first instance and the Court of first appeal came to the conclusion that the deeds did not contain a personal covenant by the mortgagor to re-pay the mortgage debt, and that, therefore, the mortgagor was not personally liable to pay the balance for which a personal decree was sought. Such a covenant, in my opinion, is quite clearly implied, if not expressed, in the undertaking to redeem the mortgaged property if the mortgagees required redemption to be made. Redemption of the mortgaged property postulates payment or satisfaction of the mortgage debt, and if the mortgagees are entitled to require redemption to be made by the mortgagor, they must be entitled to demand repayment of the mortgage debt. It is urged that in a mortgage of the kind created by either of the deeds in question a personal covenant cannot be implied where no personal obligation to re-pay is provided for. The mortgage in this case does not

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fit in with any of the kinds of mortgage defined in clauses (b), (c), (d), (e) and (f) of section 58 of the Transfer of Property Act. It makes a good approach to "usufructuary mortgage" as defined in clause (d) but does not fall entirely within its ambit. It was stipulated that the mortgagee was to receive possession of the mortgaged property, and he did receive possession thereof, but there is a stipulation involved in the expression "mortgage with possession for three years" to the effect that for three years the mortgagor would not be entitled to exercise his right of redemption and the mortgagee would not be entitled to demand redemption during that period. The three years period was to commence from the time of the second deed as stipulated therein. After the expiry of the three years, during which neither party was at liberty to enforce his rights, whatever they might be, what was to happen? If it was a usufructuary mortgage pure and simple, the mortgagor would have the right to redeem the mortgaged property at any time during the period of limitation, but the mortgagee would have neither the right to foreclose nor the right to be redeemed, that is to say, to enforce payment by means of a suit for a mortgage decree for sale of the mortgaged property. In the mortgage under consideration, however, the mortgagor expressly gave the mortgagees the right to require redemption to be made by him. The kind of mortgage known as "anomalous mortgage" defined in clause (g) of section 58 of the Transfer of Property Act is the only one in which the mortgage under consideration may be placed according to its terms. In the case of *Gupta v. Administrator-General of Burma* (1) Rutledge C.J. and Brown J., after

(1) (1927) I.L.R. 5 Ran. 558.

quoting with approval the observation of Rankin J. in *Pell v. Gregory* (1),

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“In India a mortgage does not necessarily import a personal obligation to repay. *Prima facie* this obligation is present in simple mortgages, and of course, in English mortgages. *Prima facie* it is not present in mortgages by conditional sale and in usufructuary mortgages. In each case the question is one of construction of the mortgage instrument * * *.”

held that

“a personal covenant cannot be implied in an anomalous mortgage, where no personal obligation to re-pay is provided for.”

The mortgage was described as an “anomalous mortgage,” but its terms were not set out in material particulars in the judgment, and in my opinion the conclusion arrived at by the learned Judges was simply that the question was in each case one of construction of the terms of the mortgage instrument.

The principle laid down by their Lordships of the Privy Council in *Ram Narayan Singh v. Adhindra Nath Mukherji* (2), as I understand it, is that whether there is any personal liability on the mortgagor or not depends on the words of the bond and the nature of the transaction between the parties. Lord Parker observed at page 400:

“The sole question which remained therefore was whether there was any personal liability on the part of the mortgagor for payment of that portion of the loan and interest which remained unsatisfied out of the rents of the villages. In considering this question it must be borne in mind (1) that a loan *prima facie* involves such a personal liability; (2) that such a liability is not displaced by the mere fact that security is given for the repayment of the loan with interest; but (3) that

(1) (1925) I.L.R. 52 Cal. 828.

(2) (1916) I.L.R. 44 Cal. 388.

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the nature and terms of such security may negative any personal liability on the part of the borrower."

That case deals with the claim by a usufructuary mortgagee against his mortgagors to enforce an alleged personal liability of the mortgagors when the mortgagee found that he could not receive by collection of rent from the property mortgaged sufficient to discharge the principal of the loan with interest as mentioned in the deed, and their Lordships held that the nature and terms of the deed were such as to show that it was not originally intended that the mortgagor should be personally liable. It was held in the case of *Pars Ram Jaishi Ram v. Brij Mohan Lal and others* (1), that

"even assuming the deed in the present case to be a usufructuary mortgage, the words 'the mortgagees shall be competent to recover the same in any way they like' in the deed meant that the mortgagees could recover it also from the person and *other* property of the mortgagor."

From these authorities it follows that a mere determination that a mortgage is a usufructuary mortgage or an anomalous mortgage does not bring the matter to an end, but the nature of the transaction and the terms of the deed must be considered in arriving at a determination whether the mortgagor is personally liable to discharge the mortgage debt. This proposition has hardly been assailed on behalf of the respondent who, however, urges that the passage "I shall redeem when the mortgagees require redemption to be made" does not involve a personal undertaking to pay the mortgage debt. For this contention the interpretation put on the mortgage bond in the case of *Luchmeshar Singh v. Dookh*

(1) (1931) I.L.R. 13 Lah. 259.

Mochan Jha and another (1) is relied on. In the mortgage bond in that case it was stipulated,

"having paid the principal money in the month of Chait 1297 we shall take back the document and the land. In case we fail to repay the principal money at due date the *sudbharna* bond shall remain in force.",

and it was held that in this contract there was no agreement to re-pay the principal money. It is plain that this stipulation did not give the mortgagee any right to require redemption regarding which the mortgagor had the legal right to exercise at any time within the period of limitation, and the passage

"in case we fail to repay the principal money at due date the *sudbharna* bond shall remain in force "

connotes something just the opposite of the right in the mortgagee to enforce payment or redemption at his discretion. The learned advocate for the appellants has also referred me to the case of *Nagar Damodara Shanbhogue v. Chandappa Pujary and thirty others* (2) where it was held,

"that, on the true construction of the mortgage deed, there was no personal covenant to repay the balance of the mortgage money so as to entitle the mortgagee to sue for sale of the mortgaged property for the realization of that amount."

The terms of the mortgage deed in that case do not show like those of the mortgage deeds before me that the mortgagor had the right of demanding redemption of the mortgaged property from the mortgagor. The most important of the cases in which a similar conclusion was arrived at upon the interpretation of the mortgage deed is the Privy Council

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(1) (1897) I.L.R. 24 Cal. 677.

(2) (1933) I.L.R. 56 Mad. 892.

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case of *Narotam Das v. Sheo Pargash Singh* (1). In that case the mortgage deed, *inter alia*, stated :

" I have by this instrument hypothecated the whole of my property in taluq Chandipur Birhar, situate in Fyzabad. * * * As the aforesaid taluq of Chandipur Birhar is under management under the Encumbered Estates Act, and I have already filed in the office of the Superintendent a schedule of my debts specifying the names of my creditors, I do hereby promise and give it in writing that I shall without any plea repay the principal with interest within the term of two years. * * * The mode of repayment will be, that after paying up the scheduled debts, I shall first of all pay up the debt covered by this bond, including interest * * * I shall thereafter appropriate the profits of the estate and attend to the liquidation of other debts. I shall not take the profits of the estate without paying up the present debt with interest ; if I do take the profits, it will be for the payment of this debt. I shall, until this debt is repaid, abstain from contracting other debts from the bank or anywhere else."

It will be seen that the property mortgaged was saddled with the burden of paying scheduled debts at the time when it was mortgaged. So the stipulation is that out of the money derived from the property the scheduled debts were to be paid, then the mortgage debts, and then other debts. The parties contemplated at the time of the contract not only that the scheduled debts and the mortgage debts were to be realized out of this property, but also that even after paying up those debts, the property would leave a surplus for the discharge of other debts. The parties evidently never contemplated that any other property or any other remedy is to be resorted to for the purpose of discharging or realizing the debt due on this mortgage deed. These cases, in my opinion, are clearly distinguishable from the one under consideration which contains

a clear undertaking on the part of the mortgagor to redeem upon redemption being demanded by the mortgagees. Redemption necessarily involves repayment of the mortgage debt. If the mortgagor undertakes to re-pay the mortgage debt, then the only way in which it can be enforced when he does not re-pay as stipulated is to sell the property held as security, and, if the sale proceeds are not sufficient, to realize the balance by means of a personal decree.

I accordingly set aside the orders of the Court of first instance and of the Court of first appeal and direct that a personal decree be passed in favour of the plaintiffs if they hold in the plaintiffs' favour upon the objection on the ground of limitation. The case is sent back to the Court of first instance to determine the issue as to whether the plaintiffs' right to a personal decree has been barred by limitation or not and to dispose of the case in accordance with its decision on this issue. The plaintiffs will get their costs of the first appellate Court and of this Court, advocate's fee in this Court two gold mohurs, in any event. The costs of the trial Court will abide the final result.

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