

APPELLATE CIVIL.

Before Mr. Justice Mya Bu, and Mr. Justice Mackney.

1938

July 14.

A.K.R.M.M.K. CHETTYAR FIRM

v.

P.L.V.M. CHETTYAR.*

Mortgage decree—Mortgage over properties in Burma and India—Mortgagee's right of action—Court's jurisdiction determined by Civil Procedure Code—Jurisdiction of Courts in Burma over property in Burma only—Adaptation of Laws Order, paragraph 10—Civil Procedure Code, ss. 16, 17—Transfer of Property Act, s. 67.

A person who has, prior to 1st April 1937, a mortgage on properties situate in Burma and in British India cannot obtain a decree in respect of the property in British India in a suit on the mortgage filed by him after 1st April 1937 in a Court in Burma.

The words "a decree" in s. 67 of the Transfer of Property Act do not necessarily mean "a single decree". The Act gives the mortgagee a right of action in respect of both the properties in Burma and in India, but it makes no provision as to the Courts to which the mortgagee must have recourse in exercising that right of action. He must have recourse to the Courts having jurisdiction and the jurisdiction of the Courts is determined by the Civil Procedure Code.

S. 16 of the Civil Procedure Code, as altered by the Adaptation of Laws Order, becomes applicable only to property situate in British Burma, and the word "Courts" in s. 17 of the Code now mean "Courts in Burma."

Chettyar, R.M.K.A.R. v. R.M.K.A.R.V. Chettyar, [1938] Ran. 176; *Gardner v. Lucas*, 3 Ap. Ca. 582; *N. B. Natu v. Bharuti*, I.L.R. 54 Bom. 495 (P.C.); *Setrucharlu v. Maharaja of Jeypore*, I.L.R. 42 Mad. 813 (P.C.), referred to.

Surridge for the appellant.

No appearance for the respondent.

MACKNEY, J.—On the 8th June 1931 the first and second respondents mortgaged to the plaintiff-appellant certain properties, some of which are situate in the District of Insein but others are situate in the Madras Presidency of British India. The amount of the loan became due six months after the date thereof.

* Civil First Appeal No. 32 of 1938 from the judgment of the Assistant District Court of Insein in Civil Regular Suit No. 11 of 1937.

On the 5th October 1937 the plaintiff-appellant filed a suit in the Assistant District Court of Insein for the recovery of the amount of the loan due with interest, and for sale of the mortgaged property in default of payment.

The learned Assistant District Judge held that he had no jurisdiction to deal with the property in British India owing to the fact that on the 1st April 1937 Burma ceased to be a part of British India. In consequence of the alterations in the Burman Laws introduced by the Government of Burma (Adaptation of Laws) Order, 1937, the Courts in Burma ceased to be able to entertain any suit relating to property in British India. Accordingly, whilst granting the plaintiff-appellant a mortgage decree for the full amount of the principal and interest due on the mortgage bond, he gave a preliminary decree for sale only of that property which was situated in Insein District and within the jurisdiction of his Court.

The plaintiff now appeals to this Court on the ground that the Assistant District Court did have jurisdiction in respect of the mortgaged property situated in British India and should have granted a mortgage decree in respect of all properties subject to mortgage.

The appeal has been heard *ex-parte*.

Clause 10 of the Adaptation of Laws Order reads as follows :

“ Nothing in this Order shall affect the previous operation of, or anything duly done or suffered under, any Burman law, or any right, privilege, obligation or liability already acquired, accrued or incurred under any such law or any penalty, forfeiture or punishment incurred in respect of any offence already committed against any such law.”

By definition, “ Burman law ” means a law as defined in section 149 of the Government of Burma Act, 1935.

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This section refers to laws in force in Burma at the time of the Act and states that

“In this section the expression ‘law’ does not include an Act of Parliament, but includes any ordinance, order, byelaw, rule or regulation having in Burma the force of law.”

Now, it is said that under section 67 of the Transfer of Property Act, which is a Burman law, as operative before the 1st April 1937 and at the time the present mortgage was executed, the plaintiff-appellant had acquired a right to obtain from the Court a decree that the mortgaged property be sold. It is argued that this right was a right to obtain a single decree in one Court, because the mortgagee was entitled to enforce his claim against the whole of the mortgaged property at one time. The learned counsel for the appellant attaches great significance to the words “a decree” which he wishes to interpret as “a single decree.”

I am unable to agree that the words necessarily have this meaning. The method of obtaining a decree is a matter of procedure with which it would surely be out of place to deal in an Act setting out the rights of mortgagors and mortgagees. The plain meaning of section 67 is that the mortgagee is entitled to obtain the assistance of the Court concerned in bringing the mortgaged property to sale if the mortgage money has become due and remains unpaid. Whether the mortgagee will have to obtain one decree, or more than one decree, will depend on the procedure which has been laid down for such suits. The Transfer of Property Act, no doubt, gave the plaintiff-appellant a right of action in respect of both the properties in Burma and in the Madras Presidency, but it makes no provisions as to the Courts to which the plaintiff-appellant must have recourse in exercising that right of action. It is obvious that he must have recourse to the

Courts having jurisdiction : and the jurisdiction of the Courts is determined by the Code of Civil Procedure.

It has been pointed out in *R.M.K.A.R. Arunachullam Chettyar v. R.M.K.A.R.V. Valliappa Chettyar* (1) that no suitor has any vested interest in the course of procedure, nor any right to complain even if during the litigation the procedure is changed. The Civil Procedure Code confers no substantive rights : it is a Code of rules whereby rights may be enforced before the Courts. Lord Blackburn's observations in *Gardner v. Lucas* (2) are quoted where he says :

" I think it is perfectly settled that if the Legislature intended to frame a new procedure, that instead of proceeding in this form or that, you should proceed in another and a different way ; clearly these bygone transactions are to be sued for and enforced according to the new form of procedure. Alterations in the form of procedure are always retrospective, unless there is some good reason or other why they should not be."

By the Adaptation of Laws Order, in section 16 of the Code of Civil Procedure, the word " India " has been altered to the word " Burma ", so that the section becomes applicable only to property which is situated in British Burma. Section 16 (c) directs that suits for sale in the case of mortgage shall be instituted in the Court within the local limits of whose jurisdiction the property is situate. Section 17 of the Code is as follows :

" Where a suit is to obtain relief respecting, or compensation for wrong to, immovable property situated within the jurisdiction of different Courts, the suit may be instituted in any Court within the local limits of whose jurisdiction any portion of the property is situate : "

In *Setrucharlu Ramabhadra Raju Bahadur and others v. Maharaja of Jeypore* (3), their Lordships of

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(1) [1938] Ran. 176.

(2) (1878) 3 Ap. Ca. 582.

(3) (1919) I.L.R. 42 Mad. 813.

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the Privy Council observed that in this section the word "Courts" must be held to mean Courts to which the Code applies; that is to say, in the present case, it must be held to mean "Courts in Burma." The appeal with which their Lordships were dealing was from the decree passed in a suit brought to enforce a mortgage of property which was situate partly in a district to which the Code applied and partly in a scheduled district under Act XXIV of 1839, that is to say, a district subject to the special jurisdiction of the Agency Courts. A decree for the sale of the mortgaged property was made by the Subordinate Judge and affirmed by the High Court of Judicature at Madras. Their Lordships, in consequence of their view of section 17 of the Code, varied the decree passed by the High Court deleting the order for sale so far as applicable to the land situated within the jurisdiction of the Agency Court. They added :

"This will be, of course, without prejudice to the respondent's right to apply in the Agency Court for an order for sale of those lands."

Again, in *Nilkanth Balwant Nattu and others v. Vidya Narasinh Bharati and others* (1), their Lordships dealt with an appeal from the High Court at Bombay in a suit in the Satara Court of the Bombay Presidency to enforce certain mortgages of property situated not only in the Bombay Presidency but also in the Kolhapur State which is not within British India. It was observed :

"The provisions of the Code are regulations dealing with the jurisdiction and governing the procedure of the Courts in British India, and their Lordships are of opinion that the words in section 17 'within the jurisdiction of different Courts' must mean

(1) (1930) I.L.R. 54 Bom. 495.

within the jurisdiction of different Courts to which the Code applies, that is to say, Courts in British India Inasmuch as the properties in Kolhapur are not within the jurisdiction of any Court in British India, the learned Subordinate Judge of Satara had no jurisdiction to try the suit, so far as it related to the mortgaged properties situate in Kolhapur."

In the result, the plaintiffs-appellant succeeded so far as the mortgaged properties in Satara and Belgaum were concerned but failed as regards the mortgaged property in Kolhapur.

It appears to me, therefore, that the learned Assistant District Judge rightly refused to grant a decree for sale of the mortgaged property which is in British India.

The substantive rights of the plaintiff-appellant are in no wise injured because, owing to the fact that the procedure provided does not enable him to sue in one Court in Burma for sale of all the mortgaged properties, he is not to be deemed to have waived his claim against the property situated in British India, inasmuch as it cannot be included in the present suit.

This appeal must, therefore, be dismissed.

No order as to costs is necessary as it has been heard *ex-parte*.

MYA BU, J.—I concur.

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