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Pitámbardhári's power, but none against the plaintiff, a stranger to the bargain and Pitámbardhári's antagonist. The conclusion we have arrived at is, we think, to some extent at least, supported by the observations of Hall, V.C., in the case of *Hooper v. Smart*, (1) although that case was itself, no doubt, quite different from one now before us.

We, therefore, reject the application with costs.

Application rejected.

(1) L. R. 1 Ch. D. 98.

Note.—Section 372 of the new Civil Procedure Code (Act X. of 1877) seems intended to meet such a case as the above, but would not apply in the case of a suit instituted or appeal presented before 1st October 1877: see Act X. of 1877, sections 1 and 3.

[APPELLATE CIVIL.]

Before Mr. Justice Melwill and Mr. Justice Pinhey.

September 12. JAGJIVAN NANA'BHA'I (APPLICANT) v. SHRIDHAR BALKRISHNA NAGARKAR (OPONENT).*

Injunction—Mortgage—Power of sale.

When property mortgaged is situated in the mofussal, but the parties to the mortgage are resident in Bombay, and the instrument of mortgage is in the English form, the parties must be held to have contracted according to English law, and to be entitled to enforce their rights according to that law. In such a case the mortgagees can exercise a power of sale contained in the mortgage deed, and cannot be restrained from exercising such power, merely because the mortgagor has filed a suit for redemption. The mortgagor can only stay the sale *pendente lite* by paying the amount due into Court, or by giving *prima facie* evidence that the power of sale is being exercised in a fraudulent or improper manner, contrary to the terms of the mortgage.

THIS was an appeal from an order made by Ráv Báhádúr Vishnu M. Bháide, Subordinate Judge of Tháná, at Násik.

The facts of the case, in so far as they are material to this report, are as follows:—

On the 15th of June 1871 one Shridhar Bálkrishna Nagarkar, an inhabitant of Bombay, executed in the regular English form a deed of mortgage to Jagjivan Nanábhái, also of Bombay, mortgaging to the latter two salt-pans belonging to him and situated at Bombay, in the Tháná District, for a sum of Rs. 9,000. On the

* Misc. Ap. No. 11 of 1877.

24th February 1872 a further sum of Rs. 2,000 was advanced on the security of the same property, and a second deed reciting the previous one was executed in the same form. Each of these deeds contained a clause giving to the mortgagee the power of selling the mortgaged property on the failure, by the mortgagor, to pay the amount due by a certain fixed time. On the 21st of February 1877 the mortgagee gave notice to the mortgagor of his intention to sell the property, unless a certain sum alleged by the mortgagee to be due to him from the mortgagor were paid at once. On the 17th of March 1877 the mortgagor filed a redemption suit, alleging that nothing remained due on the two mortgages, but that, if any sum were found to be due, he was ready to pay it, and at the same time prayed for an injunction to restrain the mortgagee from the exercise of his power of sale till the final disposal of his redemption suit.

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To this prayer for an injunction the mortgagee at once objected, and urged that the mere institution of the suit, unaccompanied by an actual tender of the whole of the money advanced and laid out by the mortgagee upon the estate, together with the interest due thereon, or a deposit of the same in Court, afforded no sufficient ground for the issue of such an injunction.

The Subordinate Judge overruled this objection on the ground that it had been held in *Rhodes v. Buckland*⁽¹⁾ that a mortgagee could not sell the mortgaged property during the pendency of the suit, and observed that the value of the property seemed much greater than the sum likely to be found to be due in respect of the mortgages. He, therefore, granted the injunction as prayed.

The mortgagee applied to the High Court to set aside the injunction.

Macpherson (with him *Shivshanker Govindram*) for the applicant:—The case of *Rhodes v. Buckland*,⁽²⁾ relied on by the Subordinate Judge, does not decide that the mere institution of a redemption suit justified the Court in depriving the mortgagee of his power of sale. It is necessary that *prima facie* evidence of fraud on the part of the mortgagee should be given.—Kerr

(1) 16 Beav. 212.

(2) 16 Beav. 212.

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on Injunctions, 192. Fisher on Mortgages, 2nd ed., 501, 268, 277.
Adams v. Scott. (1)

V. N. Mandlik for the opponent :—In *Keshavrav v. Bhavanji* (2), a doubt has been expressed as to the mortgagee's power of sale in the mofussal. Here the property intended to be sold is situated in the mofussal : *Pitambar v. Vannali.* (3)

MELVILL, J. :—In *Keshavrav v. Bhavanji* (4) I have expressed a doubt whether, in the case of an ordinary mortgage in the mofussal, the mortgagee can exercise a power of sale given by the instrument of mortgage. In the present case, although the mortgaged property is situated a few miles out of Bombay, the parties are residents of Bombay, conducting their transactions through Bombay solicitors, and the instrument of mortgage is a regular and formal deed in English form. I think that in this case the parties must be held to have intended to contract with reference to English law, and to be entitled to enforce their rights according to that law : *Bholanath Coondoo Chowdry v. Unodapersad Ray.* (5)

The deed of mortgage between the parties contains a power of sale to be exercised after a previous notice to the mortgagor. Such a notice was given to the plaintiff on the 21st February 1877, and thereupon, on the 17th March, the plaintiff filed this suit to redeem, and obtained an injunction restraining the defendant from exercising the power of sale. The object of the present appeal is to set aside this injunction.

The Subordinate Judge appears to have granted the injunction on no other ground except that, as a suit for redemption has been filed, matters ought to remain *in statu quo* until the decision of the suit. The case of *Rhodes v. Buckland* (6) does not establish the proposition laid down by the Subordinate Judge, viz., that "a mortgagee cannot sell the mortgaged property under the terms of the mortgage-deed during the continuance of a suit for the redemption of the mortgage." In that case the Court did restrain the exercise of the power of sale; but the case was a peculiar one, and the person seeking to redeem was not the mort-

(1) 7 W. R. 213.

(2) 8 Bom. H. C. Rep. 142 A. C. J.

(3) I. L. R. 2 Bom. 1.

(4) 8 Bom. H. C. Rep. 142 A. C. J.

(5) 1 Boulch. 97; see p. 101.

(6) 16 Beav. 212.

gagor, but a puisne incumbrancer claiming to be entitled to pay off a prior mortgage. As a general rule, when a power of sale has become absolute, the exercise of the power cannot be suspended by the filing of a bill to redeem: *Adams v. Scott*.⁽¹⁾ If it could be so suspended, the mortgagee might be deprived of his remedy and kept out of his money, for an indefinite time. The owner of the equity of redemption can only stay the sale *pendente lite* by paying the amount due into Court, or by giving *primâ facie* evidence that the power of sale is being exercised in a fraudulent or improper manner, contrary to the terms of the mortgage.

In the present case the plaintiff alleges that the mortgage debt has been fully satisfied: and if he could satisfy the Court that there are good *primâ facie* reasons for supposing that to be the case, the Court might properly restrain the sale. But the Subordinate Judge has not proceeded on that ground, nor is there any evidence at present on record which would have justified him in so doing. Neither is there anything to show that the defendant, in regard to the intended sale, is acting fraudulently or oppressively, or contrary to the terms of the mortgage. The plaintiff's pleader wishes to put in evidence to shew that in 1873 the defendant fraudulently endeavoured to have the equity of redemption sold under a decree obtained by a third party. That may be so; but it does not follow that there is any fraud in the defendant's present proceedings.

The plaintiff's allegation of full satisfaction of the debt appears inconsistent with the attempt which he makes to shew that in 1873 and 1874 he tendered sums, amounting to more than Rs. 2,000, which were refused by the defendant. If tenders were made, and improperly refused by the defendant, the plaintiff might have brought his suit to compel the defendant to receive the money due to him, and to reconvey the property. He has admittedly done nothing since the date of the alleged tenders, and has not now paid into Court the money which he alleges that he then tendered, and which, if then due, must be due still.

Under these circumstances we must hold that the injunction complained of, was issued on insufficient grounds, and must be set

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aside. The plaintiff will, of course, be at liberty to apply again for such an injunction, if he can make out a *prima facie* case, shewing that the debt has been fully satisfied, or if he pay into Court a sum which is *prima facie* sufficient to discharge the debt. Costs on plaintiff.

PINHEY, J. :—I would reverse the order of the Subordinate Court enjoining the defendant Jagjivan Nanábhái to refrain from exercising the power of sale given to him under his instrument of mortgage, pending the disposal of the suit brought by the mortgagor Shridhar Balkrishna Nagarkar for the redemption of the property, as I consider that the injunction has been granted on insufficient grounds, and without any evidence being adduced sufficient to warrant the exercise of this extraordinary power of the Court. No witness was examined, nor was any affidavit filed, in support of the application for an injunction, and the only verified document on the record is the plaint. When a mortgagee has, in pursuance of a power of sale given to him under his instrument of mortgage, served the mortgagor with notice of his intention to exercise this power, the mortgagor is not entitled to file a suit for redemption, and then ask the Court for an injunction restraining the mortgagee from exercising his power of sale, unless fraud is charged against the mortgagee. To grant such an injunction would be to cancel one of the clauses of the deed to which both the parties had agreed, and to annul one of the chief securities on which persons advancing money on mortgage rely. It would, of course, be otherwise if the notice of sale had been given by the mortgagee after the suit for redemption had been filed.

The mortgagor is entitled to have the sale of the property suspended only if he can shew either that he has paid off the mortgage lien, or that he has made a legal tender of the amount due which has been refused. In the case before us there is not even *prima facie* ground shewn at present for considering that the mortgage lien has been paid off. And as to a tender of payment having been made, the statements made in support of such are vague and unsatisfactory. So far as the record of the case throws any light on this point, it would appear that the tender or tenders said to have been made through Messrs. Hearn, Cleveland, and

Peile were made before the expiration of the period for which the property was mortgaged, and were coupled with a condition that the defendant should, before receiving the money, execute an engrossed reconveyance simultaneously offered for his signature. This would not be a tender which the mortgagee would be bound to accept. Another tender is suggested, but not distinctly alleged. The mortgagor alleges that Rs. 9,864 were deposited with the sarkarkun, in whose jurisdiction the mortgaged salt-pans are, and that the money was returned by him, because the mortgagee did not receive it. There is no distinct allegation that this money was ever tendered to the mortgagee by the sarkarkun or by any one else, and refused. The plaintiff's pleader wishes us to infer that such a tender was made : but, in the absence of evidence, we can draw no such inference ; and, as there is no reason shewn why the sarkarkun should have undertaken the duty of paying off the mortgage, if we are to infer anything, I should incline rather to the inference that the money was deposited with the sarkarkun, not that he might tender it to the mortgagee, but to secure the sarkarkun from the consequences of his act in letting the mortgagor cancel the power of attorney under which the mortgagee had up to that time been dealing with the produce of the salt-pans, and letting the mortgagor back into enjoyment of the salt-pans.

No sufficient grounds for the issue of the injunction granted by the Subordinate Court appear in this case, and I would, therefore, dissolve the injunction, and reverse the order of the Subordinate Court in this behalf. Costs of the injunction matter and of this appeal should be borne by the plaintiff Shridhar Balkrishna Nagarkar.

Injunction dissolved and order reversed.

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