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[APPELLATE CIVIL JURISDICTION.]

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*Before Sir M. R. Westropp, Knight, Chief Justice, and Mr. Justice  
Kemball.*

PITAMBER NA'RA'YENDA'S AND ANOTHER (DEFENDANTS AND APPELLANTS)  
*v.* VANMALI SHAMJI (PLAINTIFF AND RESPONDENT).\*

1875.  
October 11.

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*Mortgage—Power of sale—Lands situate in the Mofussil—Deed in  
English form.*

A sale, without the intervention of a Court of Justice, of mortgaged lands situate in the Mofussil of Bombay, under a power of sale, contained in an indenture of mortgage in the ordinary English form, is valid, if due notice be given to the mortgagor of the mortgagee's intention to sell, and the sale be fairly conducted.

Position of a mortgagee selling under his power of sale, explained.

THE plaintiff, as purchaser at an auction sale, held under the power of sale contained in an English mortgage-deed, of certain lands situate in the Mofussil of Bombay, sued to eject the mortgagor, the first defendant, and his tenant, the second defendant, and to recover mesne profits from them. The Subordinate Judge made a decree in favour of the plaintiff; against that decree the defendants preferred this regular appeal. The only question argued at the hearing of the appeal was whether a sale of lands in the Mofussil, under the power of sale contained in an indenture of mortgage in the ordinary English form, was valid.

\* Regular Appeal No. 16 of 1875.

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*The Honourable Rao Sahab V. N. Mandlik*, for the appellants, cited *Bhuwanee Churn Mitr v. Jaykishen Mitr* <sup>(1)</sup>, Macpherson on Mortgages, pp. 45 to 47, 91 and 92 (5th Edition), and *Keshará Krishna Joshi v. Bhawanji Bábáji* <sup>(2)</sup>.

*Shántáráam Náráyen* for the respondent.

WESTROPP, C.J.:—PitáMBER NáráYendás described, in the mortgage to which we shall next refer, as a Hindu inhabitant of Bombay, by indenture of mortgage of the 25th October 1871, made in the ordinary English form, in consideration of Rs. 15,000 duly advanced to him by the Land Mortgage Bank of India, Limited, an English Joint Stock Company, having its head office in London, and a branch office in Bombay, where the mortgage transaction was arranged, mortgaged (with the usual proviso for redemption) to that Bank in fee certain lands in the villages of Giryá and Bassein in the Taluka of Bassein and Collectorate of Thaná, and a bungalow and stable in the same village of Bassein, to secure that sum, which, by that indenture, he covenanted to repay to the Bank in three instalments, viz., Rs. 2,500 on the 25th October 1872, a further sum of Rs. 2,500 on the 25th October 1873, and the balance of Rs. 10,000 on the 25th October 1874, with interest on the sum advanced, or so much thereof as should from time to time remain due, at the rate of 10 per cent. per annum in equal quarterly payments, viz., on the 25th January, 25th April, 25th July, and 25th October in every year—the first payment to be made on the 25th January 1872; and that, if any quarterly payment of interest were in arrear for more than one calendar month after becoming due, he would pay compound interest on the amount of interest in arrear at the rate of 10 per cent. per annum. The mortgage further provided that, “in default of payment of the said instalments of Rs. 2,500 each within one calendar month from the times hereinbefore respectively appointed for the payment thereof, the said sum of Rs. 15,000, or the balance thereof then due, with interest thereon, shall immediately thereupon become payable to the said Land Mortgage Bank of India, Limited, their successors or assigns, and it is hereby provided and declared that it shall be lawful for the said Land Mortgage Bank, &c., at any time or times after the said principal

(1) S. D. A. Rep. Calc. 1847, p. 354.

(2) S. Bom. H. C. Rep. 142, 144, A. C. J.

sum of Rs. 15,000 shall become due and payable whether by lapse of time or under the provisions hereinbefore contained, without any further consent on the part of the said Pitámberdás Náráyendás, his heirs, executors, administrators, or assigns, to sell" the said mortgaged premises "either by public auction or private contract, with power upon any such sale to make any stipulation as to title, or evidence, or commencement of title, or otherwise, which the said Land Mortgage Bank, &c., shall deem proper, and also with power to buy in, or rescind, or vary, any contract for sale, and to resell without being responsible for any loss occasioned thereby, and for the purposes aforesaid, or any of them, to execute and do all such assurances and things as they shall think fit. Provided always, and it is hereby agreed that the said Land Mortgage Bank, &c., shall not execute the power of sale hereinbefore contained unless and until default shall have been made in payment, at the time hereinbefore appointed for payment thereof, of some principal money or interest; the payment whereof is intended to be hereby secured, and they shall have given a notice in writing to the said Pitámberdás Náráyendás, his heirs, executors, administrators, or assigns, to pay off the moneys for the time being owing on the security of these presents, or left a notice in writing to that effect at or upon some part of the said premises, &c., and default shall have been made in payment of the whole or part of such moneys for one calendar month from the time of giving or leaving such notice, or unless and until the whole or some part of some quarterly payment of interest, which shall become due on the security of these presents, shall have become in arrear for one calendar month; and every such notice as aforesaid shall be sufficient, though not addressed to any person or persons by name or designation, and notwithstanding the person or any of the persons affected thereby, may be unborn, unascertained, or under disability." Then followed the usual provisoes exempting the purchaser at any such sale from inquiring whether any of the cases had happened justifying a sale or otherwise as to its propriety or regularity, and leaving the mortgagor Pitámberdás Náráyendás to his remedy in damages only against the Land Mortgage Bank for any irregularity or impropriety in the sale, also exempting the purchaser from the necessity of seeing to the

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due application of the purchase money. It was further agreed that the Bank should, out of the proceeds of sale, in the first place pay the expenses of the sale, in the next place apply such proceeds in or towards satisfaction of the amount due to it upon the mortgage, and lastly pay the surplus (if any) to Pitámberdás Náráyendás, his heirs, executors, administrators and assigns. The mortgage also contained the usual clause of entry and covenant for further assurance, and was duly registered, the mortgagor, however, remaining in possession of the mortgaged premises, Mr. J. H. Littlewood, an Indo-Briton, being, as his tenant, in possession of the bungalow and stable.

Pitámberdás Náráyendás failed to pay the instalments of the principal and also the interest at the times stipulated. After due notice to him the mortgaged property was advertised by the Bank for sale about the middle of 1872; but at his request, and on making some payments on account, the sale was not then persisted in. His defaults in payment of interest and instalments subsequently continuing, notice was sent by the Bank to him by post on the 28th of October 1873 of their intention to sell the mortgaged premises if he did not pay the amount due upon the mortgage. He has denied receipt of that notice; but the evidence perfectly satisfies us, as it also did the Subordinate Judge, that the notice reached Pitámberdás in due course of post. We are satisfied also that he fully understood the nature of the provisions in the deed of mortgage, notwithstanding a faint effort made on his behalf to induce the Court below to believe the contrary. The sale took place on the 10th of December 1873 by public auction in Bombay, conducted by respectable auctioneers, Messrs. Crawford & Co. The intended sale was for eight or ten days previously duly advertised in Bombay in three English newspapers and in three native newspapers, and hand-bills, announcing it, were sent to the site of the property and there distributed four days previously to the sale.

There were upwards of twenty bids for the mortgaged property, which was eventually knocked down to the present plaintiff (respondent) Vanmali Shamji for Rs. 16,500, which he paid to the Bank, and the property was conveyed to him by that Land Mortgage Bank by a regular conveyance in the English form, dated the 14th January 1874. In the Court below, the first defendant

the mortgagor, alleged that the sale was at an undervalue, and that the property was really worth Rs. 80,000. This, however, he failed to establish, and the offer made in that Court by the purchaser Vanmali Shamji, to let the mortgagor have the property back again if he would repay to the purchaser the amount of his purchase money, Rs. 16,500, with interest at 9 per cent. per annum, was, as the Subordinate Judge observed, a clear proof that the purchaser had not made a very valuable bargain.

He brought the present suit in the same year to eject the mortgagor Pitámberdás Náráyendás from the lands, and to recover from him mesne profits, Rs. 584-9-4; and also to eject his tenant, Mr. Littlewood, from the bungalow and stable, and to recover from him as mesne profits, or rent, Rs. 366-10-8, pursuant to a notice which he had given to him some months previously that, if he did not give up possession of the last-mentioned premises, the purchaser would hold him responsible for rent at the rate therein specified.

The Subordinate Judge made a decree in favour of the plaintiff in the terms prayed by his plaint.

Several grounds of defence were put forward in the Court of the Subordinate Judge, some of which were repeated in the memorandum of appeal; but the only point which the learned pleader for the appellants, the Honourable Mr. V. N. Mandlik, insisted upon in this Court, was that the Land Mortgage Bank had not power to sell the mortgaged property without the intervention of a Court of Justice. He relied upon a decision in 1847 of the Sadr Adalut for Bengal, *Bhuwanee Churn Mitr v. Jaykishen Mitr*; <sup>(1)</sup> (see also Macpherson on Mortgages, 5th Edition, p. 45.) in which that Court refused to recognize the validity of such a power as to lands in the Bengal Mofussil. After making certain remarks upon what the Court deemed to be the impolicy of upholding such a power, it, speaking of the Bengal regulations, said: "The regulations will be searched in vain for any express enactment prohibiting the sale of a mortgaged estate under a power of sale. But such a power is repugnant to the principles of the regulations enacted by Government for regulating the transfer of immoveable property in satisfaction of debt

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in general, and in satisfaction of debts on mortgage in particular. The regulations do not sanction, in any case, the transfer of immoveable property in satisfaction of a debt, without the intervention of a public officer, except such transfer be by the direct and immediate act of the proprietor himself." The first observation to be made with regard to that case is that there are not in the Bombay regulations, as in those of Bengal, any provision regulating the foreclosure of mortgages. The next remark to be made is that Mr. Justice Macpherson, in his book on mortgages, (pp. 46, 47,) expresses strong doubts as to the supposed impolicy, if that be a legitimate argument, of sanctioning a power of sale; and, lastly, that it is mentioned in a recent case before L. Jackson and McDonell, JJ., in the High Court of Calcutta<sup>(1)</sup> that *Bhuwanee Churn Mitr v. Jaykishen Mitr* <sup>(2)</sup> has been overruled by a subsequent decision of a Division Bench of the High Court, *Sonatum Bysack v. Koonjo Behari Bysack* (unreported), where the point as to the validity of a sale of lands in the Bengal mofussil under a power contained in a mortgage arose incidentally upon a question of costs. The validity of such a power was mooted in *Bhanoomutty Chowdrain v. Premchand Neogee*,<sup>(3)</sup> and L. Jackson, J., said that, if called upon to determine it, he and McDonell, JJ., would have felt considerable difficulty. They disposed of the case upon another ground, namely, that there had been no notice, given to the purchaser under a power of sale in an English mortgage deed of 1862, of foreclosure proceedings by the holder of a deed of conditional sale of 1864, and held that a suit for possession by the widow of the latter was, therefore, unsustainable against the purchaser under the mortgage of 1862. Certain observations by Mr. Justice Melvill in *Kesharav Krishna Joshi v. Bhawanji Babaji*<sup>(4)</sup> on the Bengal Sadr Adalat decision, were also relied upon by Mr. V. N. Mandlik; but our brother Melvill does not appear to have been informed that the Bengal Sadr Divani Adalat decision had been overruled even in Bengal itself by a Division Bench of the High Court at Calcutta. My brother Kemball in *Kesharav Krishna Joshi v. Bhawanji Babaji*<sup>(5)</sup> expressed his opinion to be in favour of the validity of a sale under a power contained in a

(1) *Bhanoomutty Chowdrain v. Premchand Neogee*, 15 Beng. L. R. 28; see p. 31.

(2) S. D. A. Rep. Calc. 1847, p. 354.

(3) 15 Beng. L. R. 28.

(4) 8 Bom. H. C. Rep. 142; see p. 144, A. C. J.

(5) 8 Bom. H. C. Rep. 142; see p. 142, A. C. J.

mortgage of lands in the Bombay mofussil, there being nothing either in the spirit or the letter of the Bombay regulations to the contrary. And I may observe that there is not any inconsistency in maintaining the validity of a sale under such a power with the decision of our predecessors in this Court in *Rámji v. Chinto* <sup>(1)</sup> which has been followed by us. It is to the effect that a deed of mortgage, with a clause of conditional sale, shall be regarded as redeemable, although the time fixed, on which the mortgage was to become converted into a sale, has passed. In the latter case, if the clause of conditional sale be enforced, the property, howsoever it may exceed in value the amount of the advance on mortgage, becomes wholly vested in the mortgagee, which is unquestionably inequitable, whereas a mortgagee with a power of sale, not only cannot, either directly or through the medium of an agent or a trustee, himself become the purchaser under the power, *Robertson v. Norris*, <sup>(2)</sup> affirmed on appeal; <sup>(3)</sup> nor can his agent, who has acted in surveying the property and receiving the interest, purchase even on his own account from the mortgagee under the power, *Orme v. Wright*, <sup>(4)</sup> *In re Bloye's Trusts*; <sup>(5)</sup> but when the mortgagee, without the intervention of the Court, sells under the power, after deducting the fair expenses of the sale and the amount due to himself on the mortgage, he must, as a trustee for the mortgagor, make over the surplus to him, if there be no assignee of the mortgagor or incumbrancer puisne to the selling mortgagee entitled to receive it or a portion of it. While a suit for redemption is pending against a mortgagee, he cannot sell under his power of sale, *Rhodes v. Buckland*, <sup>(6)</sup> nor can he sell without notifying his intention to the mortgagor, *Anonymous*. <sup>(7)</sup>

In the present case Pitamberdás, the mortgagor, must have known perfectly well that, dealing as he was with an English Company, which had an established form for the deeds of mortgage required by it from persons borrowing money from it, he could not have obtained the loan which was made to him without giving such a power of sale as is contained in the mortgage of the 25th October 1871. In *Bholanath Coondoo Chowdry v. Unodapersad Roy*, <sup>(8)</sup> which is not in other respects in point in this

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(1) 1 Bom. H. C. Rep. 199.

(5) 1 M. and G. 488.

(2) 1 Giff. 421.

(6) 16 Beav. 212.

(3) 4 Jur. N. S. 155.

(7) 6 Madd. 10.

(4) 3 Jur. 19.

(8) 1 Boul. 79 ; see p. 101.

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case, Colville, J., said: "The defendants have taken on land, in the mofussil, a mortgage in the English form: the inference, therefore, is strong that they intended to contract with reference to the English law, and to enforce their rights according to that law." Similar remarks have often been made in cases where the parties (not English) have thought proper to adopt the English form of contracting. That such was the intention of the parties, where the mortgagees are an English Joint Stock Company, having their chief office in London, would seem to be *à fortiori*. We fully believe that to have been the understanding of the mortgagor Pitámberdás at the time of the execution of the mortgage. Sales, under such a power as we have here, have always, when not open to special objection, been upheld in the Island of Bombay; and unless we find the law to be otherwise in the Bombay mofussil, we see no sufficient reason for imposing upon parties contracting with respect to land situated there, a disability which does not exist in the Island. We are unable to find either enactment or decision which invalidates a sale under such a power in a mortgage affecting lands in the Bombay mofussil.

Under a power of sale, such as that in this case, neither the concurrence of the mortgagor nor of any person claiming under him, whose claim is puisne to that of the selling mortgagee, is necessary to the validity of the sale. Sugden, Vendors and Purchasers, chap. X., section IV., pl. 57., (11th Ed.) p. 522, and the cases there referred to *in notis*, and *Alexander v. Crosbie*,<sup>(1)</sup> affirmed on appeal.<sup>(2)</sup> The provision that any impropriety or irregularity in the sale shall be the subject of a suit for damages, and shall not affect the lands, when in the hands of a purchaser under the power, is beneficial to the mortgagor as well as to the mortgagee in this that it tends to secure a better price at the sale.

The sale appears to have been fairly conducted, and with all due notice to the mortgagor, so that if he had been willing and able to redeem, he might have done so before the sale. And we see nothing in the conduct of the Land Mortgage Bank which amounted to a waiver of their right to sell.

The decree must be affirmed with costs.

*Decree affirmed.*

<sup>(1)</sup> 6 Ir. Eq. Rep. 513.

<sup>(2)</sup> 1 Jones and LaTouche 666.