

## APPELLATE CIVIL

Before Mr. M. C. Chagla, Chief Justice.

PETRO ANTONIO LUCIANO SEQUEIRA, AND ANOTHER (ORIGINAL DEFENDANTS), PETITIONERS *v.* GOOLBAI NADIRSHAW DORA BJI, AND ANOTHER (ORIGINAL PLAINTIFFS), OPPONENTS.\*

1953

Feb. 9

*Presidency Small Cause Courts Act (XV of 1882), s. 41—Transfer of Property Act (IV of 1882), s. 58 (e)—Nature of possession of the mortgagor under English mortgage—Whether mortgagee can recover possession by taking proceedings in the Small Cause Court.*

In an English mortgage as defined by s. 58 (e) of the Transfer of Property Act, 1882, there is a transfer of the absolute interest of the mortgagor to the mortgagee but some interest is left in the mortgagor in that he has a right to a reconveyance and also the right of redemption. The mortgagee becomes entitled to possession of property but he may not take actual possession; in such a case the mortgagor continues in possession by the permission, express or implied, of the mortgagee. Where the mortgage provides that on the mortgagor committing a default the mortgagee would be entitled to enter into actual possession, the stipulation amounts to the withdrawal of such permission on the default taking place.

*Heath v. Pugh*,<sup>(1)</sup> and *Ram Kinker Banerjee v. Satya Charan*,<sup>(2)</sup> referred to.

*Held*, therefore, the possession retained by the mortgagor under the English mortgage being permissive, the mortgagee is entitled to take possession of the mortgaged property by instituting proceedings under s. 41 of the Presidency Small Cause Courts Act, 1882.

Civil Revision Application against the order of B. S. Kalelkar, Judge, Small Cause Court, Bombay.

The facts are set out in the judgment.

*K. B. Sukthankar*, for the petitioners.

*D. P. Madon* and *N. S. Khambata*, with *Narielwala & Framroze*, for the opponents.

Chagla C. J. A very interesting question arises in this revision application with regard to the right of a mortgagee under an English mortgage to enforce his right of possession against the mortgagor. It appears that the petitioners mortgaged a property by an English mortgage to secure a sum of Rs. 33,000 and the mortgage was transferred to the opponents on January 26, 1949. There was a covenant in the mortgage deed that on the failure on the part of the mortgagors to pay interest as

\* Civil Revision Application No. 1279 of 1952.

<sup>(1)</sup> (1881) 6 Q. B. D. 345.

<sup>(2)</sup> (1938) 41 Bom. L. R. 672, p.c.

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stipulated and to pay the mortgage amount on January 26, 1950, the mortgagees would be entitled to enter into possession. Admittedly the petitioners committed default both in respect of payment of interest and the payment of principal. Thereupon the opponents gave notice to the petitioners to attorn to them as tenants. The petitioners refused to do so and thereupon the opponents took out proceedings under Chapter VII of the Presidency Small Causes Court Act to eject. An order for ejectment was passed by the Small Causes Court, and it is against that order that this revision application is preferred.

Mr. Sukthankar's contention is that the Small Causes Court had no jurisdiction to entertain these proceedings under Chapter VII. Mr. Sukthankar's contention is that what the opponents were doing was to enforce a provision under the mortgage and the opponents could not enforce that provision in the Small Causes Court, but they should have filed a suit in the High Court for doing so. On the other hand, Mr. Madon's contention on behalf of the opponents is that the petitioners were in possession of the property by leave and license, that the license determined when there was a default as provided in the mortgage deed, and on the default taking place the license was revoked and the opponents became entitled to the possession of the property.

Now, well known text books on mortgages and eminent English Judges have admitted frankly the difficulty in defining the relationship between a mortgagor and a mortgagee when the mortgagor remains in possession of the mortgaged property. We are here dealing with an English mortgage and an "English mortgage" is defined under s. 58 (e) of the Transfer of Property Act as:

"Where the mortgagor binds himself to re-pay the mortgage-money on a certain date, and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will re-transfer it to the mortgagor upon payment of the mortgage-money as agreed, the transaction is called an English mortgage."

Therefore in an English mortgage there is the transfer of the absolute interest of the mortgagor to the mortgagee, but the transfer is not complete and some interest is left in the mortgagor because he has a right to the reconveyance of the property and also to the right of redemption. To that extent it may be said that the whole of the interest of the mortgagor is not transferred to the mortgagee, but subject to this right

which I have just indicated there is a complete and absolute transfer of the interest of the mortgagor to the mortgagee. Therefore under an English mortgage a mortgagee is entitled to the same rights as the mortgagor himself had in the property and one of the most important rights is the right of possession. There can be no doubt that on an English mortgage being executed the mortgagee becomes entitled to possession of the property. He may not take actual possession, in which case the mortgagor continues in possession by sufferance of the mortgagee or by permission express or implied given by the mortgagee. The mortgagee may provide that on the mortgagor committing a certain default the mortgagee would be entitled to enter into actual possession. In such a case the stipulation amounts to the permission being withdrawn or the license being terminated on the default taking place. Therefore in this case when the English mortgage was executed the possession of the mortgagor was a permissive possession. The mortgagee had bound himself not to withdraw that permission unless there was a default and when the default did take place the mortgagee withdrew the permission and the license came to an end. It seems to me that under these circumstances the mortgagee was entitled under s. 41 to institute proceedings for ejectment, because s. 41 provides that when any person has had possession of any immoveable property as the tenant or by permission of another person and the tenancy or permission has been determined or has been withdrawn, the person to whom the property belongs can apply for a summons against the occupant calling upon him to show cause why he should not be compelled to deliver up the property. In this particular case the person had possession of the property not as tenant but by permission of another person, and as that permission has determined that other person is entitled to a summons against the occupant.

With regard to the nature of the mortgagor's possession under an English mortgage, there are interesting observations of Lord Selborne in *Heath v. Pugh*<sup>(1)</sup> (p. 359):

"...The possession of the mortgaged land by the mortgagor, during the subsistence of the security, and while the mortgagee did not choose to take possession, was held (at law as well as in equity) to be 'at the will' or by the 'sufferance' or 'permission' of the mortgagee, under a 'tacit agreement' which the mortgagee might determine at his pleasure. It was of the nature of the transaction that the mortgagor should continue

<sup>(1)</sup> (1881) 6 Q.B.D. 345 at p. 359.

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in possession. His possession was rightful and not by wrong. He was entitled to the rents and profits as long as he remained in possession; mesne profits accrued due and received prior to action or demand could not be recovered from him by the mortgagee."

Mr. Sukthankar has relied on a decision of the Privy Council in *Ram Kinkar Banerjee v. Satya Charan Shrimani*,<sup>(1)</sup> and his contention is that whatever view might have been taken of an English mortgage prior to this decision, after this decision it could not be said that a mortgagor under an English mortgage had no interest in the mortgaged property at all. Now, all that the Privy Council has done in this case, with respect, is to emphasise the fact that under an English mortgage a mortgagor has some interest left in the mortgaged property. That is undoubtedly so, because, as the definition of an English mortgage under the Transfer of Property Act itself indicates, a mortgagor has the right to have the property reconveyed to him and also the right of redemption. This important right that the mortgagor has does create an interest in the mortgaged property which the mortgagor enjoys. But the Privy Council has not discussed in this judgment what are the rights of a mortgagor to the mortgaged property or what is the nature of the possession that a mortgagor has of the mortgaged property under an English mortgage.

In my opinion, therefore, the Court below was right in taking the view that proceedings can be instituted under Chapter VII of the Small Causes Court Act by a mortgagee under an English mortgage to obtain possession from the mortgagor. The result is that the revision application fails. Rule discharged with costs.

*Rule discharged.*

K. B. S.

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<sup>(1)</sup> (1939) 41 Bom. L. R. 672, p. c.