1935

Present : **Koch J. and Soertsz A.J.**

WIJEWARDENE *v.* PEIRIS *et al.*

112—D. C. Colombo, 54,000.

Sale—Mortgagor sued on bond—Transfer of property to mortgagees subject to agreement to reconvey—Nature of deed—Claim for reconveyance—Tender of price.

The plaintiff, mortgagor of certain property, on being sued on the bond by the defendants, the mortgagees, entered into an agreement with them by which he undertook to execute a valid transfer of the mortgaged premises to them for a sum which represented the debt he owed them for principal and interest due on the bond, and costs of action.

The defendants on their part agreed to execute at the plaintiff's cost a valid conveyance in his favour on his paying to them on or before a certain date, a price to be ascertained in a certain way.

The terms of agreement were entered of record in the mortgage action.

In compliance with the agreement the plaintiff by deed of November 30, 1931, conveyed the land to the defendants and placed them in possession. On the eve of the expiry of the period fixed for obtaining a reconveyance the plaintiff brought this action alleging that he was ready and willing to pay the defendant a sum of money which represented the difference between the amount due on the mortgage bond and the value of the depreciation of the property under the management of the defendants.

Held, that the deed of November 30, 1931, was a sale of the property by the plaintiff to the defendants with an agreement for its reconveyance on the terms embodied in the deed.

Held, further, that a tender of the sum agreed upon before the date fixed was a condition precedent to a claim for reconveyance.

APPEAL from a judgment of the District Judge of Colombo. The facts appear from the judgment of Soertsz A.J.

N. E. Weerasooria (with him *F. C. W. van Geyzel* and *J. R. Jayawardene*), for plaintiff, appellant.

H. V. Perera (with him *H. E. Garvin*), for defendants, respondents.

Cur. adv. vult.

September 2, 1935. KOCH J.—

I agree with my brother that the principles set out in the two Indian cases, *Balkishen Das v. W. F. Legge* [1] and *Narasingerji Jyanagerji v. Panuganti Parthasaradhi Rayanam Garu* [2], do not apply. Our system of mortgage is peculiar to the Roman-Dutch law and so intrinsically different from the Indian law of mortgage, which bears a strong affinity to the law of mortgage as it obtains in England. The essence of a Roman-Dutch law mortgage or hypothec is that the ownership of the *res* mortgaged remains with the mortgagor and that the mortgagee is only given a *jus in re* in respect of the property mortgaged, which he can follow up by means of the *actio quasi serviana* also called *hypothecaria* for obtaining satisfaction of his debt against the mortgagor and those in possession of the property, whether claiming under the mortgagor or through an independent source of title—*Voet, lib. XX. tit. 4, s. 1 et seq.* and *S. C. No. 291—D. C. Colombo No. 50,490 (S. C. Minutes of July 18, 1935)*.

The case of *Ana Lana Saminathan Chetty v. Vander Poorten* [3] which appellant's Counsel relies on can be easily distinguished. The essence of this judgment lay in the fact that the two deeds Nos. 471 and 472 taken together and read as one did not pass absolute title to the grantee but reserved such beneficial interests in the grantors as to impose duties and obligations on the grantee in the nature of trusts. The covenants contained in these deeds clearly warranted such a conclusion.

Can it be said that the terms and conditions of the agreement of November 12, 1931, arrived at between the parties and duly recorded in the mortgage action No. 40,945, taken in conjunction with the recitals and covenants appearing in the deed No. 132 reserved such a beneficial interest in the appellant? I have weighed every word in these documents in the light of the position of the parties at the time they were entered into, and I agree with my brother that such of the terms as have been relied upon by the appellant to establish such an interest in him can without strain be explained away. The justification for their introduction lay in the necessity for formulating a method whereby the consideration for repurchase by the appellant could reasonably be fixed by a process of calculation.

I am also of opinion that in the circumstances there should have been a tender of this consideration or what in law amounted to tender. There was not even an attempt to satisfy this requirement so as to invest the appellant with a cause of action.

I agree with my brother that the appeal must be dismissed with costs.

SOERTSZ A. J.—

The plaintiff brought this action on September 29, 1933, alleging that he had mortgaged the premises called and known as Nagansola estate with the defendants, that they had sued him on the bond in case No. 40,945—D. C. Colombo, and had obtained judgment, but that without proceeding to execution, they had on November 12, 1931, entered into an agreement with him by which he undertook to execute a valid transfer of the mortgaged premises to them for a sum which represented

[1] *I. L. R. 22 Allahabad 149.* [2] *I. L. R. 47 Madras 729.* [3] *34 N. L. R. 287.*

the debt he owed them for principal and interest due on the bond and for costs of the action. The defendants, on their part agreed to execute at the plaintiff's cost and expense a valid conveyance in his favour on his paying to them on or before a certain date—that date was to be subject to two extensions in certain contingencies—a price to be ascertained in a certain way. The terms of the agreement were entered of record in the mortgage action. They are set forth in exhibit A filed with the answer in this case. In compliance with this agreement the plaintiff by the deed of November 30, 1931, conveyed the land to the defendants and put them in possession. This deed was not put in evidence in the lower Court, but by consent of Counsel it was admitted on appeal. It shows that the terms of agreement appearing in exhibit A were embodied in it. The plaintiff paid no interest whatever in terms of the agreement but, as already stated, brought this action on September 29, 1933, the eve of the expiry of the original period for making payment and obtaining a reconveyance. He alleged that the defendants " had neglected to look after the estate in a proper and careful and husbandlike manner and to maintain the said estate in a reasonable manner ". He estimated " the sum of Rs. 45,000 as the reasonable value of the deterioration caused to the said estate by the defendants " and claimed that he was entitled to have the said sum of Rs. 45,000 deducted out of the sum of Rs. 95,123.25, which appears to be the amount for which judgment had been entered in the mortgage bond case and he said that he " is ready and willing to pay the defendants the sum of Rs. 50,123.25 (to wit, the sum of Rs. 95,123.25 less the said sum of Rs. 45,000) and the said sum of Rs. 11,414.80 being interest up to the said September 30, 1933, and is prepared to take a conveyance of the said estate from the defendant at his cost ". He also averred that he believed that the expenditure incurred by the defendants in the upkeep of the land was in excess of what was actually required and that he had duly objected to the accounts of the defendants. He, therefore, prayed for a declaration that he was entitled to have the sum of Rs. 45,000 deducted from the Rs. 95,123.25, and that the defendants are liable to execute a transfer of the estate to him on his paying them Rs. 50,123.25 and Rs. 11,414.80 by way of interest.

The defendants, in their answer, stated that they were at all times ready and willing to execute a conveyance of the premises to the plaintiff on his performing his obligations under the agreement, but that the plaintiff had failed and neglected to do so. They averred that the plaint disclosed no cause of action.

The trial Judge dealt with the case in a manner that was not altogether satisfactory. But in the end he dismissed the plaintiff's case.

The questions that have been raised in appeal are whether the deed of November 30, 1931, constituted a mortgage within the principle enunciated by the Privy Council in the Indian cases, *Balkishen Das v. W. F. Legge*[1] and *Narasingerji Jyanagerji v. Panuganti Parthasaradhi Rayanam Garu*[2], or whether it was a transaction which was governed by the

[1] *I. L. R. 22 Allahabad 149.*

[2] *I. L. R. 47 Madras 729.*

principle in the Privy Council case from Ceylon. *Saminathan Chetty v. Vander Poorten*[1], or whether it was a sale with a contract of repurchase. In my opinion, the Indian cases do not apply. Those decisions are the logical result of a form of mortgage well known to the laws of India but radically different from the Ceylon law of mortgage. As pointed out by the learned and noble Lords in the earlier of the two cases :—" Mortgages by conditional sale under various names are a common form of mortgage in India and have come before this Board in several reported cases. It has been stated that this form of mortgage was introduced in order to enable Muhammedans contrary to the precepts of their religion to lend money at interest and obtain security for principal and interest. If so, one would expect to find that the transaction would as far as possible be made to assume the appearance of a sale ". In view of this the Privy Council held that the nature of the transaction as to whether it was a sale or a mortgage should be decided " on a consideration of the contents of the documents themselves with such extrinsic evidence of surrounding circumstances as may be required to show in what manner the language of the document is related to existing facts ". The Board then went on to point out that in the particular case before them there were clear indications that the transaction contemplated by the parties was a mortgage by conditional sale, and not a sale. For instance, there was a provision that if the Bankers—the ostensible vendees—object to receive the money and relinquish the property, the vendor may deposit the amount in the treasury " by virtue of this agreement " " and obtain possession over the Ilaka ". Now by Bengal Regulation No. 1 of 1798 " a regulation to prevent fraud and injustice " in the case of conditional sales such as these, provisions were made empowering the borrower to deposit the money in the Dewaney Adawlut of the city or Zillah in which the land was situated, and as emphasized in the Privy Council judgment, the similar provision introduced into the document under consideration at once suggests a reference to Regulation No. 1 of 1798 as being applicable to the case *and* this affords a clear clue to the intention of the parties. Again the Privy Council refers to the fact that " by Regulation No. 17 of 1806 the mortgagor under deeds of this description was empowered to redeem the land at any time within one year after the commencement of proceedings to foreclose the mortgage or render the sale conclusive provided that payment or tender be proved or deposit be made within the time above specified in the manner specified in the previous regulation ". (*I.e.*, Regulation No. 1 of 1798) . . . . The effect of the Regulation of 1806 was therefore to introduce into those parts of India to which the regulation applies the English Doctrine of an equity of redemption as applicable to the class of deeds referred to in it ".

The other Indian case relied on, *Narasingerji Jyanagerji v. Panuganti Parthasaradhi Rayanam Garu* (*supra*) was also decided on the basis that a mortgage by way of a conditional sale is well known in India. In that case Lord Blanesburgh held that although the appearance of a sale is " laboriously maintained ", in reality the transaction was a mortgage for the very cogent reasons adduced by him. For example, (*a*) " The sum

[1] *34 N. L. R. 287.*

paid had no relation to the value of the one hundred and ninety-six villages comprised in the deed of assurance". In the present case, the sum paid—even if the case is to be considered on the principles applicable in India—cannot be said to have no relation to the value of the land. That is clear from the fact that at the time of the agreement, the parties contemplated the probability of the expenditure necessary for the upkeep of the land exceeding the income, and also from the fact that when the plaintiff in his plaint said he was willing to pay some Rs. 60,000 for the retransfer, the defendants were willing to accept that offer. (*b*) There was a clause that if any portion of the land is taken up by the Government under the Land Acquisition Ordinance, any compensation awarded was to go to the ostensible purchaser and to the vendor in certain proportions. For these and other reasons the transaction in which the parties were engaged was held to be a loan and not a sale. It is really not necessary to labour this matter any further for a mortgage by conditional sale is utterly alien to the law of Ceylon. Very recently there have been a few timid attempts to dally with this kind of Indian mortgage by alluding to something called a 'Moratuwa mortgage'. There was allusion to it in the course of the argument in this case too. I think we should take this occasion to repudiate the endeavour to body forth "the forms of things unknown and to give to airy nothings a local habitation and a name". The law of Ceylon is the Roman-Dutch law according to which "the mortgagor remains the owner of the property. If the debt is not paid at the stipulated time, an action is brought for an order of Court condemning the mortgagor to pay the sum due with interest and costs, and declaring the property executable". (Morice's *English and Roman-Dutch Law, p. 57.*) The usual Indian mortgage is the mortgage known to the English law by which the property is conveyed to the creditor or mortgagee subject to an agreement to reconvey if the debt is paid. The Ceylon mortgage is the Roman-Dutch law mortgage and only created a *jus in re.* The law of Ceylon is also familiar with what is known in Roman-Dutch law as a *Pactum de retrovendendo* which is described by *Voet, bk. XVIII., tit. 3, s. 7* (*Berwick's Trans.*) as follows: "Nearly allied to the *pactum commissorium* is the *pactum de retrovendendo* agreement for repurchase the effect of which when annexed to a purchase is that the vendor may within or after a time fixed, or at any time redeem or take back the thing sold, on restoring the same price he actually received for it unless it has been expressly agreed otherwise . . . . It is the duty of a person who demands a resale from a refractory purchaser to make judicial consignation and deposit of the price offered and refused". In this state of the law in Ceylon, I find it hard to persuade myself that the defendants in this case who held a mortgage over this land and who, after an anxious career as mortgagees, sued on the bond and obtained judgment were content, without proceeding to execution of their decree, to relapse into the condition of mortgagees from which they had just emerged. I cannot bring myself to hold that these parties who are in no way affected by such religious scruples as hamper a large proportion of the Indian population, and who are fully conversant with mortgages as well as with sales with these pacts attached, should have resorted to this form of sale in order to

effect a mortgage. I therefore, hold that the Privy Council rulings in the two Indian cases referred to have no application here.

Next, there arises the question whether this case is governed by the Privy Council ruling in *Saminathan Chetty v. Vander Poorten* (*supra*). At the very outset, it must be remarked that that was a case " in the nature of an action for breach of trust and redemption ". In their plaint the plaintiffs expressed " their willingness to redeem upon the footing that the amount due to the respondent was the aggregate total of the sum advanced, money expended, interest at 9 per cent. per annum to the date of the plaint, and the sum of Rs. 25,000 for reasonable compensation and profit for the respondent's services, such aggregate total amounting, apart from expenditure, to Rs. 274,090 " . . . . The plaintiffs pleaded that by reason of " deed No. 472 and of the facts alleged in the plaint, the respondent held the estate in trust for the plaintiffs and the defendants other than the respondent . . . . that the respondent was fraudulently and in breach of the trust attempting to effect a fictitious sale to a nominee of his own at a price less than the market price ". . . . . They prayed (1) " that the Court do declare that the sum of Rs. 274;090 to be a reasonable sum to be paid to the first defendant in respect of the said loan and compensation and profit, or in the alternative that the Court do declare what sum is reasonable. (2) That the first defendant be ordered to render an account of the monies expended by him on the management, control, and working of the said property and that the plaintiffs be allowed to contest or surcharge the same. (3) That the Court do order the first defendant, on receipt of the said sum and the amount of the monies so expended when the account is taken, to reconvey to the plaintiffs and the second, third, fourth, sixth, and seventh defendants or their assigns respectively the said property ".

It is obvious that that was a totally different action from the present. In dealing with that action the learned and noble Lords of the Privy Council said that the first question is as to the construction and effect of the deeds Nos. 471 and 472 in the light of the " circumstances leading up to and surrounding their execution ". They examined the deeds and the circumstances and held that the deeds " did not operate to vest in the respondent an *absolute* title ". They held that the transaction effected by the deeds was the creation of a security for money advanced. There was no absolute title in the respondent. He held the legal title, but there was a beneficial interest outstanding in the syndicate. Our Trusts Ordinance, No. 9 of 1917, enacts in section 82—" An obligation in the nature of a trust (herein referred to as constructive trust) is created in the following cases ". Section 83—" where the owner of a property transfers or bequeaths it and it cannot be reasonably inferred with the attendant circumstances that he intended to dispose of the beneficial interest therein, the transferee or legatee must hold such property for the benefit of the owner or his legal representatives ". Section 84—" where property is transferred to one person for a consideration paid or provided by another person and it appears that such other person did not intend to pay or provide such consideration for the benefit of the transferee, the

transferee must hold the property for the benefit of the person paying or providing the consideration" . . . Section 95—" in any case not coming within the scope of any of the preceding sections where there is no trust, but the persons having possession of property has not the whole beneficial interest, therein, he must hold the property for the benefit of the person having such interest, or the residue thereof (as the case may be), *to the extent necessary to satisfy their just demands*".

The noble and learned Lords point out in their judgment that " it must not be overlooked that the syndicate had expended about Rs. 200,000 on the property before they got into conflict with the Crown, and that they had provided Rs. 64,000 towards the total sum which had to be deposited under the decree made in the Crown's favour. They could therefore have had no interest in entering into an arrangement by which in effect the whole property passed absolutely to the respondent and their expenditure was wholly lost". They also refer to the facts that the respondent cannot sell below a certain price without the consent of the syndicate; if he does sell, he has to deal with the proceeds in a certain manner; the distribution of the proceeds of sale includes payment to himself of such sums as shall be due and payable to him for the monies advanced to the Crown for the purchase from the Crown; the ultimate balance of the proceeds of sale is to be distributed *pro rata* according to their interests among the syndicate and their successors in title. In these circumstances their Lordships held, without hesitation, that an absolute interest in the land did not vest in the respondent. The matters relied upon for this finding are just those matters which find a place in the sections of the Trusts Ordinance I have referred to. It could not be reasonably inferred, consistently with the attendant circumstances, that the syndicate intended to dispose of the whole beneficial interest in the land, for they had already spent two lakhs of rupees on it. They could not have intended to pay or provide Rs. 64,000 out of the consideration paid to the Crown for the benefit of the respondent, and therefore the respondent " must hold the property for the benefit of the persons having the . . . . beneficial interest or the residue thereof, *to the extent necessary to satisfy their just demands*".

There are no circumstances in the present case to show that the beneficial interest in this land or any residue thereof is outstanding in the plaintiff. Counsel for the appellant, however, relies on certain terms in the minute of settlement of the mortgage suit drawn up on November 12, 1931, and later embodied in the deed of sale. He invites attention to the clause which provides for the present defendants taking possession of the land and maintaining it to the best of their ability, and in their discretion expending such monies as they may consider necessary having regard to the income derived therefrom and to the financial and market conditions obtaining at the time. He argues that this indicates that there was some beneficial interest remaining in the present plaintiff. I am unable to agree. The provision referred to is a stipulation which a prospective purchaser may quite naturally make. The next four clauses also relied upon are, in my opinion, introduced in order to provide a method of

ascertaining the price the plaintiff had to pay in order to obtain a retransfer and also in order to enable him, if the occasion arose, to raise the necessary funds. Particular stress was laid on clause (*b*) (3) in the agreement on the part of the plaintiffs in that case, who are the present defendants, which says that the present plaintiff shall be liable for " any excess of expenditure over income in connection with the maintenance and the upkeep of the premises and the keeping of the accounts hereinafter referred to, the *defendant* (*i.e.*, the present plaintiff) *being allowed credit in the event of such payment for any excess of income over expenditure* ". This again is only a direction as to the method of calculating the price to be paid. The words " *in the event of such payment* " must not be overlooked. I therefore find that the case of *Saminathan Chetty v. Vander Poorten* (*supra*) does not apply.

These two questions thus disposed of, I hold that the transaction between the parties to the deed of November 30, 1931, a sale by the plaintiff to the defendant of the land in question with a contract for its reconveyance on the terms embodied in the deed by the defendants to the plaintiff. That that is what the parties intended is clearly shown by the pleadings of the plaintiff and the issues suggested by his Counsel. This case then falls within the ruling in *Jeremias Fernando et al. v. Perera et al.* In that case A sold certain lands to B for a sum which represented the debt which A owed to B. By a separate deed of the same date it was agreed that on repayment of the purchase price with interest thereon at the rate of 18 per cent. or 15 per cent. if the interest be paid annually, within a period of three years, B should retransfer to A. A was to remain in possession during the three years. A remained in possession for three years and then handed over possession to B's assign, the defendant. A died nine months later and her children (the plaintiffs) asked the defendants to retransfer the land. Lyall Grant J. held that the tender of the price was a condition precedent to the performance of the promise and that time was of the essence of the contract and dismissed the action.

In the present case it is admitted, says the trial Judge, " that the plaintiff neither tendered nor paid the amount set out in paragraph (*e*) of the answer ", nor did he tender the amount which he alleged was due. All he said was that " he is ready and willing to pay the defendants the sum of Rs. 50,123.25 (to wit, the sum of Rs. 95,123, less the said sum of Rs. 45,000), and the sum of Rs. 11,414.80, being interest up to September 30, 1933, and is prepared to take a conveyance of the said estate from the defendant at his cost ". That is not a sufficient tender. On the facts, it is clear that even his assertion that he was ready and willing to pay the amount he said was due, is a piece of acting, a mere mouthing of a formula. For, when the defendants expressed their willingness to accept the amount offered although the period of payment had elapsed, and to give the plaintiff a reconveyance, he stood unmasked. But his resourcefulness did not fail him. He sought to amend his plaint and to introduce an additional claim which he could pretend would probably reduce the amount payable by him still further. I think the trial Judge's

[1] 28 N. L. R. 183.

observation that the plaintiff was 'playing for time' is justified. Every move of his appears to be with a view to ensure protracted litigation. His hope seems to be that the market will improve and make it possible for him to get back the land or to obtain a higher value for it. If his hopes are realized, the gain will be his. If they turn out vain, the loss will fall on the defendants. A case pure and simple of "Heads I win, tails you lose". There is nothing on the record to show that this amendment was accepted by the Court. It was an amendment effected after the date for obtaining the reconveyance had passed and should not have been entertained.

Moreover, in my opinion, the plaintiff was not entitled to make any deductions from the amount stipulated for in the agreement. In the circumstances alleged by him, the proper course was for him to pay or tender the amount due on the agreement under protest, and after he had obtained the reconveyance to sue the defendants to recover any sum that he alleged was due to him as a result of the depreciation in the value of the land. I do not understand how he can claim damages in respect of a land that was not yet his. The cases of *Babahamy v. Alexander*[1] and *Appuhamy v. Silva*[2] are two other cases that show that tender is a necessary preliminary to an action of this kind and that in a case such as this time is of the essence of the contract, and the tender has to be made on or before the date fixed.

I, therefore, hold that the plaintiff's action fails and dismiss the appeal with costs.

Appeal dismissed.