Privy Council Appeal No. 93 *of* 1917.

Sri Raja Setrucherla Ramabhadraraju Bahadur Garu and others - *Appellants*

v.

Sri Sri Sri Vikrama Deo Maharajulum Garu, Maharaja of Jeypore - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT MADRAS.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 25TH FEBRUARY, 1919.

Present at the Hearing :

VISCOUNT HALDANE.
VISCOUNT CAVE.
LORD DUNEDIN.
SIR JOHN EDGE.
MR. AMEER ALI.

[*Delivered by* LORD DUNEDIN.]

On the 4th January, 1906, the appellants, who are zemindars, borrowed from the respondent, the Maharajah of Jaipur, 5 lacs of rupees, and in security thereof mortgaged certain lands. The mortgage is in ordinary form providing for payment of interest and compound interest, but contains the following special clause :—

> " These properties are mortgaged and retained in our possession. But in case at any time any amount remains due out of the amount of interest payable on the due dates of any two years consecutively, or in case, within seven years from this date, the entire amount of principal and interest then remaining due be not paid, though the interest is paid according to instalments, we shall raise no sort of objections to your entering on and taking possession of the above-mentioned mortgaged properties, irrespective of the said mortgage term."

The term of payment was, therefore, on the 4th January, 1913. By the 4th January, 1911, the borrowers were two years in arrear in payment of interest, and were in need of further

monies. Accordingly, a second mortgage was granted in July, 1911, for the said two years of interest and compound interest and further monies, amounting in all to Rs. 120,000. The deed, after reciting the various sums, which amount to the Rs. 120,000, continues as follows :—

> " We shall pay the above principal sum of Rs. 1,20,000 and the interest accruing according to the terms of the deed, in full, on the 4th January, 1916. Further, though the 4th January, 1913, is the due date for the mortgage deed for Rs. 5,00,000.0.0 executed on the 4th January, 1906, in your favour by Nos. 1, 2, 3, 4, 5 and 7 among us and by late Sri Somasekhararaju Bahadur Garu and registered as No. 22 of 1906 in the Sub-Registrar's office at Parvatipur, you and we have settled now that the due date for the said deed should also be the 4th January, 1916, along with this deed. Therefore, by this change, the entire terms of the registered deed, dated the 4th January, 1906, are deemed to have been included in this deed, and we shall agree to the said terms even regarding the discharge of the principal and interest of this deed also and be bound by them. If, according to the terms of this deed, the interest of each year be not paid on the respective due date, these terms will not prevent you from recovering the said amount then and there, if you should so desire, without waiting for the due date, namely the 4th January, 1916."

The appellants paid no interest whatever after the date of the second deed, and accordingly, in July, 1913, there being two years' interest in arrear, the respondent brought the present suit for decree for the whole sum due and for an order of sale of the mortgaged properties. To this action the appellants pled in defence, first, that the mortgage was a usufruct mortgage and did not authorise sale; and secondly, that the action was premature, the term of the 4th January, 1916, not having yet arrived. The learned Subordinate Judge held that the mortgages were simple mortgages, with merely an alternative power of entry into possession, and granted decree and order for sale in ordinary form.

Appeal being taken to the High Court of Madras, that Court affirmed the view that the mortgages were simple mortgages. They further held that the sale of the lands for principal was premature at the date of the decree of the Subordinate Judge, but in respect that by the time the case was before them the term of the 4th January, 1916, had been passed and no payment had been made, they allowed the decree of the Subordinate Judge to stand.

Appeal being taken to this Board, the appellants urged that, inasmuch as the Appeal Court had held that the sale was premature in respect of the principal and only good for the interest, it was not permissible for them to enlarge the suit as laid because at the time they came to deal with the appeal a decree for the principal on a new suit would have been competent, to which the respondent replied that, as the proceeding was entirely executory, it was proper for the Appellate Court to pronounce a decree which would regulate the true rights of parties as they stood at the time when the final judgment came to be pronounced.

The first question, however, which arises, and which if settled one way renders any further discussion unnecessary, is whether, in view of the terms of the second mortgage, the suit raised in July, 1913, for the whole sums due was or was not premature. This question depends on the meaning of the clause :—

> " If according to the terms of this deed, the interest of each year be not paid on the respective due date, these terms will not prevent you from recovering the said amount then and there, if you should so desire, without waiting for the due date, namely, the 4th January, 1916."

It is settled that, apart from special stipulation, there is no right to demand a sale of mortgaged lands for payment of interest in arrear. The learned Judges of the High Court thought that " the said amount " meant interest alone, and that the clause received meaning as giving the right of sale for interest. Their Lordships do not think that that is the meaning of the clause. It was a most natural thing that, as nothing had been ever paid by the borrowers, the lender, on being asked to allow the surplus interest to become principal in a new mortgage, and to postpone the term of the old mortgage, should stipulate that, if this non-payment of anything should continue, he might be done with the whole matter and call everything up. Besides, a power to enter into possession if interest was not paid had already been given, for all the terms of the first mortgage are incorporated in the second. It seems, therefore, antecedently much more probable that the meaning of the clause, if ambiguously expressed, should be to give the power of recalling the prolongation of the term than to give a mere power of sale for interest, which would avail little. This view would lead to an affirmance of the decree, though on different grounds.

There is, however, another point. Some of the lands of which sale had been decreed are situate in what are known as the agency districts. Now the suit is raised in terms of the Code of Civil Procedure, 1908. By Section 1 (3) the Code is, with the exception of certain sections not here in point, excluded from the scheduled districts, and by Act 24 of 1839 the district in which the lands above referred to are situate was scheduled. The learned judges of the Court of Appeal thought that the matter was met by Section 21 of the Code, which provides that no objection as to the place of suing shall be allowed by any Appellate Court unless the objection was taken in the Court of First Instance, which in this case had admittedly not been done. Their Lordships cannot agree with this view. This is not an objection as to the place of suing ; it is an objection going to the nullity of the order on the ground of want of jurisdiction. The order for sale is made under sections of the Code of Civil Procedure which the Code itself says are not to apply to the scheduled district.

The learned Counsel for the respondent sought to justify the decree in respect of the terms of Section 17, which provides that :—

> " Where a suit is to obtain relief respecting, or compensation for wrong to, immovable property situate 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."

Their Lordships think that " Courts " here must be held as meaning Courts to which the Code applies, and that therefore no help is to be claimed from this section.

Their Lordships think, therefore, that the decree pronounced by the High Court must be varied by deleting the order for sale so far as applicable to the lands situate within the agency districts. 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.

This variation is insufficient in their Lordships' opinion to deprive the respondent of any portion of his costs here or in the Courts below. Their Lordships will humbly advise his Majesty accordingly.

In the Privy Council.

SRI RAJA SETRUCHERLA RAMABHADRARAJU
BAHADUR GARU AND OTHERS

v.

SRI SRI SRI VIKRAMA DEO MAHARAJULUM
GARU, MAHARAJA OF JEYPORE.

DELIVERED BY LORD DUNEDIN.

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