

*Privy Council Appeal No. 74 of 1935*

*Bengal Appeal No. 79 of 1933*

Pradyumna Kumar Mullick - - - - - *Appellant*

*v.*

Kumar Dinendra Mullick and another - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM  
IN BENGAL

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE  
OF THE PRIVY COUNCIL, DELIVERED THE 4TH JUNE, 1937

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*Present at the Hearing :*

LORD MACMILLAN.

SIR SHADI LAL.

SIR GEORGE RANKIN.

[*Delivered by* SIR SHADI LAL.]

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On the 13th February, 1920, two persons, namely Kumar Dinendra Mullick and Kumar Ganendra Mullick, executed, in favour of Nandalal Roy and Pulin Krishna Roy, a mortgage of certain house property situated in the town of Calcutta, to secure the repayment of a loan of Rs.300,000 with interest thereon at 9 per cent. per annum. The mortgagors did not redeem the mortgage within the stipulated period of one year with the result, that on the 26th July, 1921, the mortgagees brought an action to recover the money due to them by a sale of the mortgaged property. They obtained on the 12th April, 1922, a preliminary decree for sale, which was followed by a final decree on the 16th April, 1923.

In pursuance of the final decree, the mortgaged property was directed to be sold by public auction on the 5th January, 1924; but the sale was postponed for one year in accordance with an arrangement arrived at between the parties for the satisfaction of the claim of the decree-holders. One, Pradyumna Kumar Mullick, who is the plaintiff in the present action, agreed to discharge the entire debt due to the decree-holders and also to advance Rs.21,923 to the judgment debtors on terms which will be discussed presently. He paid on the 5th January, 1924, Rs.100,000 to the decree-holders, and promised to pay on the 27th June, 1924, Rs.287,411, 5 annas, and 6 pies, which was the balance of the money due to them under the final decree for sale.

The plaintiff duly paid the sum to the decree-holders, and also the additional amount as a loan to the judgment debtors. Thereupon, two deeds were executed on the 27th June, 1924, in his favour. One of them was a deed of assignment by the decree-holders of their rights under the preliminary and the final decrees for sale with "the full benefit of all powers, rights, remedies and securities" conferred upon them by the mortgage deed and the aforesaid decrees.

The second document, which was executed by the debtors, was a mortgage deed, by which they covenanted to pay, on the 5th January, 1925, to the plaintiff two sums of money, (1) Rs.387,411, 5 annas, and 6 pies, which was paid by him to satisfy the decree; and (2) Rs.21,923 advanced by him to the mortgagors. The mortgage money was to carry interest at 11 per cent. per annum, and the repayment thereof was secured, not only by the property specified in the first deed of mortgage, but also by two other houses conveyed by the second deed. These provisions do not require any comment, as similar covenants are found in almost every deed of mortgage. But a clause was inserted in the deed, which is certainly of a novel character; and it is this clause which has misled the High Court. In the event of the mortgagors' failure to redeem the property within the stipulated period, the clause in question empowered the mortgagee to include the newly mortgaged properties "within the order for sale contained in and ordered by the said decrees, as if the last mentioned properties have been comprised and included in the said indenture of mortgage of the 13th day of February, 1920, between the mortgagors of the one part and the said Nandalal Roy and Pulin Krishna Roy of the other part, without having to institute a fresh suit on the footing of these presents, and also to include the amounts due and owing upon these presents for the time being as having been included in the said in part recited indenture of the 13th day of February, 1920, and in the said decrees."

On the 25th August, 1924, the new mortgagee was substituted for the decree-holders in the final decree for sale obtained by them on the mortgage of 1920; and the houses which were mortgaged by that deed, were sold, and the price realised by the sale was paid to him. It appears that the properties conveyed by the deed of 1924 were sold privately without invoking the clause mentioned above. After giving credit for the amounts realised by the judicial and private sales, the mortgagee was still entitled to a large sum of money, which, as calculated on the basis of the covenants contained in the deed of 1924, amounted to Rs.267,513, 14 annas, and 7 pies. It was for the recovery of this sum that he made an application in December, 1931, under Order 34, Rule 6, of the Code of Civil Procedure, 1908, asking the Court to make a personal decree for the recovery of that sum from the mortgagors. He based his claim on the clause in the deed of 1924 allowing him to

treat the money due to him on that instrument "as having been included" in the mortgage deed of 1920 and "in the said decrees". The application was, however, dismissed on the ground that, as it was made after the expiry of three years from the date of the last judicial sale, it was barred by limitation.

The mortgagee, thereupon, commenced the present action on the 19th February, 1932, for the recovery of the money on the personal covenant contained in the deed of 1924. The claim was resisted on technical pleas, but they were all overruled by Buckland J., who held that the plaintiff was entitled to a personal decree on the mortgage deed in his favour. The judgment of the Trial Judge was reversed on appeal by a Division Bench, composed of Costello and Lort Williams JJ. The learned Judges dismissed the suit on various grounds based mainly on the rejection of the plaintiff's application under Order 34, Rule 6, of the Code of Civil Procedure. It is against the decree pronounced against him by the Court of Appeal that the plaintiff has brought the present appeal, and after considering the arguments addressed by the learned Counsel for the parties, their Lordships have no hesitation in holding that the appeal must succeed.

Before dealing with the points of law decided by the learned Judges, their Lordships must clear the ground by stating that the mortgage-deed of 1924 was registered in accordance with the law. The certificate by the Sub-Registrar on the deed makes it clear that it was presented for registration on the 28th June, 1924, and was registered as required by the Indian Registration Act. It was probably for this reason that the defendants did not object to its admissibility on the ground of its non-registration either in their written statement before the Trial Court, or in the memorandum of appeal preferred by them against the decree granted to the plaintiff by that Court. The plaintiff was, therefore, not called upon to produce evidence to prove the registration of the deed. Costello J. has obviously made a mistake in finding fault with the plaintiff's claim on the ground that "no evidence was given to show that the deed of the 27th June, 1924, had ever been registered as a mortgage".

On the merits, their Lordships observe that the pleas advanced by the defendants to defeat the plaintiff's claim, and sustained by the Court of Appeal, spring from the peculiar clause to which reference has already been made. It is true that under that clause the mortgagee was at liberty to include the additional properties conveyed by the deed of 1924 "within the order for sale" made in pursuance of the final decree, as if they had been "comprised and included" in the mortgage of 1920, and to treat the money due to him on the second mortgage as if it was included in the first mortgage and in the aforesaid decree for sale. There, however, can be no doubt that the parties had no authority to add to the decree something which was not included in the claim upon which it was founded. Nor could they confer

upon the Court jurisdiction to enforce a claim which had not been embodied in a decree or an order having the force of a decree. Their Lordships think that any attempt to enforce the claim in the manner prescribed by the clause was bound to fail.

Assuming, however, that the remedy mentioned in the clause could be legally enforced, the plaintiff was not thereby debarred from availing himself of his undoubted right to bring a suit on the footing of the second mortgage; and the circumstance that he made an infructuous application to obtain a personal decree under Order 34, Rule 6, did not take away that right.

It appears that the Court of Appeal treated the second mortgage as an adjustment of the decree for sale within the meaning of Order 21, Rule 2, Civil Procedure Code; but the terms of the deed do not furnish any justification for that view. The mortgage was an independent transaction, by which new rights were created in favour of the mortgagee. The deed conveyed, by way of security, certain house property which was not previously mortgaged, and contained fresh covenants for personal liability. It provided for the payment of interest at a rate higher than that stipulated in the first mortgage deed. Moreover, the amount secured by the new deed exceeded the sum due on the first mortgage. It is true that the consideration for the new mortgage included, inter alia, the sum calculated on the basis of the final decree; but that fact would not convert that mortgage into a transaction which can be held to be an adjustment of a decree.

There was, in their Lordships' opinion, no adjustment of the decree for sale, such as is contemplated by Order 21, Rule 2; and it was not the duty of the decree-holder to certify the alleged adjustment to the Court executing the decree. Nor does section 47 of the Civil Procedure Code apply to the case. The suit does not seek to execute the decree made in the previous case, but purports to enforce the rights conferred upon the plaintiff by the deed of 1924, which rights are materially different from the terms of the decree.

It is also said that the rule of *res judicata* operates as a bar to the suit. The only matter previously decided was that the application for a personal decree made in December, 1931, was barred by limitation. But in the present case there is no issue as to limitation which can be affected by the previous decision, which proceeded upon the special facts applicable to that application.

Their Lordships are unable to understand how the rule of estoppel, which has been relied upon by the Court of Appeal, can have any application to the facts of this case. It appears to have been assumed that the plaintiff having elected to apply for a personal decree in the previous case was estopped from bringing a suit to enforce his rights under the second mortgage. But this view cannot be sustained.

Apart from the consideration that the remedy by an application for a personal decree was, as explained above, not legally available to the plaintiff, there is no warrant for confining him to that remedy, or for depriving him of his right to bring a suit after the dismissal of his application on the ground of limitation. Moreover, the doctrine of estoppel rests upon the principle that the person invoking it has relied upon a declaration, act, or omission of another person, and has thereby been induced to change his position to his detriment. There is no suggestion in this case that the mortgagee by making the application for a personal decree led the mortgagors to act as they otherwise would not have acted, or to change, in any way, their position to their prejudice.

These are the grounds, upon which the learned Judges of the Court of Appeal have dismissed the suit, but none of them can be sustained. The learned Counsel for the respondents, realising his inability to support the decree on any of the grounds decided in their favour by the Court below, has argued that the suit to enforce the personal liability was barred by limitation. The mortgage deed was, as stated, executed on the 27th June, 1924, and the suit was instituted on the 19th February, 1932. Now, the period of limitation for a suit for the recovery of money on a registered bond is six years, and as the present suit was brought after the expiry of that period from the date of the instrument, it would be barred by time. But, as the Trial Judge points out, there was, before the expiration of six years, not only payment by the Receiver on behalf of the debtors, but also an acknowledgment of liability contained in the conveyance of the 14th March, 1928. This acknowledgment, satisfying as it does the requirements of section 19 of the Indian Limitation Act, IX of 1908, gives a new period of six years from the date of the acknowledgment for instituting the suit. The Trial Judge holding that the suit was brought within six years from the date of the acknowledgment, rightly overruled the plea of limitation. The defendants in their appeal from the decree of the Court of first instance did not challenge that decision, and the Court of Appeal accordingly stated that "nothing further, therefore, need be said upon that point". In their Lordships' opinion there is no substance in the plea of limitation, and it must be rejected.

For the reasons stated above, their Lordships will humbly advise His Majesty that the appeal should be allowed, the decree of the Court of Appeal be reversed, and that granted by the Trial Court be restored. The appellant must have the costs incurred by him here as well as in India.

In the Privy Council

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PRADYUMNA KUMAR MULLICK

v.

KUMAR DINENDRA MULLICK  
AND ANOTHER

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DELIVERED BY SIR SHADI LAL

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