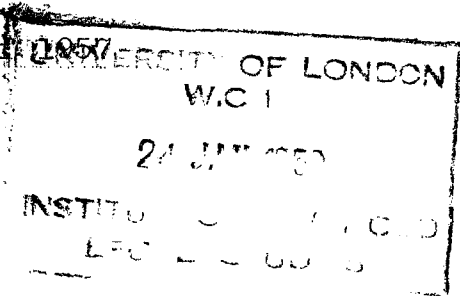


20,1958

IN THE PRIVY COUNCIL

No. 6 of 1957



ON APPEAL FROM THE COURT OF APPEAL

FOR EASTERN AFRICA AT NAIROBI

B E T W E E N :

MOHAMEDALI JAFFER KARACHIWALIA
(First Defendant) Appellant

52068

and

1. NOORALLY RATTANSHI RAJAN NANJI
(Plaintiff)
2. ISMAILIA CORPORATION LIMITED
(Second Defendant)
3. KARMALI KHIMJI PRADHAN
(Third Defendant) Respondents

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CASE FOR THE APPELLANT

RECORD

1. This is an Appeal from the Order of the Court of Appeal for Eastern Africa dated the 27th March 1956, whereby the said Court dismissed with costs an Appeal by the Appellant from the judgment of the Supreme Court of Kenya at Mombasa (Mr. Justice Henry Mayers) dated the 11th November 1954 and all proceedings subsequent thereto in an action (Civil Case No. 213 of 1953) wherein the Respondent Noorally Rattanshi Rajan Nanji (hereinafter called "the first Respondent") was the Plaintiff and the Appellant and the Respondents Ismailia Corporation Limited and Karmali Khimji Pradhan (hereinafter respectively called "the second Respondent" and "the third Respondent") were the Defendants.

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2. The said action was begun by a Plaint dated the 8th August 1953 whereby the first Respondent as third mortgagee under an Indenture of Mortgage (hereinafter called "the Third Mortgage") dated the 29th October 1951 claimed judgment against the Appellant for inter alia -

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- (1) Shs. 163,874/94 being Shs.150,000/- principal sum under the Third Mortgage, and Shs.13,874/94 interest thereon as set out in the Third Mortgage from 1st February, 1952, to 31st July, 1953;
- (2) Further interest on the said principal sum of Shs.150,000/- at the rate of and in the manner set out in the Third Mortgage from 1st August, 1953 till judgment; 10
- (3) Order for the sale of the mortgaged premises if the Appellant failed to pay the total decretal amount by a date to be fixed by the Court; payment to the second Respondent and the third Respondent of the respective amounts due under their respective mortgages and payment to the first Respondent of his decretal amount; 20
- (4) Personal decree for balance (if any) after the realisation of the security in full.

3. In this Appeal it is not proposed to dispute the findings of fact of the learned trial Judge. The grounds of the present Appeal are twofold: (a) that on the true construction of the Third Mortgage and of section 67 of the Indian Transfer of Property Act 1882 (as applied to Kenya) the first Respondent was not entitled to an Order for the sale of the mortgaged property; and (b) that, even if he was, the Order dated the 15th November 1954, the Preliminary Decree for Sale and the Final Decree for Sale hereinafter mentioned were not in the form prescribed by the relevant provisions of the Indian Transfer of Property Act 1882 (as applied to Kenya) and were otherwise erroneous. 30

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4. The Appellant is the lessee of three parcels of land situate on Mombasa Island. By an Indenture dated the 29th October 1951 the Appellant mortgaged the said three parcels in favour of the second Respondent to secure repayment of the sum of Sh.84,000 together with interest thereon; by a second Indenture of the same date he mortgaged the same three parcels, subject to the first mortgage, in 40

10 favour of the assignor of the third Respondent to secure repayment of a sum of Shs.21,623 together with interest thereon. By the Third Mortgage he mortgaged the same three parcels in favour of the first Respondent, subject to the first and second mortgages, to secure repayment of the sum of Sh.150,000 together with interest thereon at the rate of 4% on the first Sh.100,000, 9% on the second Sh.25,000 and 12% on the third Sh.25,000.

20 5. The covenants in the Third Mortgage so far as relevant to this appeal were as follows: First, after recitals, the mortgagor (that is, the Appellant) covenanted to pay to the mortgagee (that is, the first Respondent) the sum of Shs.150,000 on the 30th June 1968 together with interest computed as therein provided and he covenanted to pay such interest at the end of every month as it accrued due and payable. Then follows an assignment by the mortgagor to the mortgagee of the three parcels of land for the residues of their respective terms of years (except the last two days of each term) together with buildings then in course of erection and to be erected thereon. The mortgagor further covenanted with the mortgagee in the terms following :-

30 "(b) During the term of this mortgage and so long as any moneys remain due and owing under these presents the mortgagor will pay all the amounts whether for principal interest or otherwise due or to fall due under the first and second mortgages and also pay the ground rent and all Municipal rates and taxes and all outgoings in respect thereof regularly.

(d) To insure and keep insured all buildings situate and to be erected on the land;

40 (e) Should the mortgagor make any default in payment of the ground rents, Municipal rates and taxes insurance and payments of premium or premia in respect thereof or should he fail to pay interest regularly and punctually to the mortgagee under the first and second mortgages or should he fail to pay the interest due on the principal sum or sums advanced regularly

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as hereinbefore provided or should he fail to carry out any of the covenants and conditions and agreements herein contained then in any one of such cases the mortgagee shall be at liberty to demand the repayment of the principal sum together with all interest due thereon notwithstanding the time for repayment thereof hereinbefore provided and shall be entitled to recover the same through a Court of law: Provided Always that the mortgagee shall not enforce his right to claim and recover the whole principal sum in event of any of the above defaults until after 1st January 1952, and even after the said date until after a five weeks previous written notice is first given by the mortgagee to the mortgagor demanding the compliance of any default or breach as aforesaid

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(f) He the mortgagor agrees that he will repay the sum of Sh.150,000 (Shillings one hundred and fifty thousand) to be advanced hereunder by twenty five half yearly instalments of Sh. 5,000 (Shillings Five thousand) the first of such half yearly instalments to be paid on the 30th day of June One thousand nine hundred and fifty two and the remaining twenty four at the end of every six months and thereafter the balance by either half yearly instalments the first seven instalments of Sh.3,000/- (Shillings three thousand) each and the eighth instalment of Sh.4,000 (Shillings Four thousand) thus paying off the whole amount by the 30th day of June One thousand nine hundred and sixty eight as hereinbefore provided....."

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The provision for redemption in the Third Mortgage was as follows :-

"(h) The mortgagee hereby covenants with the mortgagor that if the mortgagor shall repay the total principal sum advanced under these presents together with interest thereon due as hereinbefore provided by the 30th day of June One thousand nine hundred and sixty eight the mortgagee will at any time thereafter after the expiry of the stipulated date at the request and cost of

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the mortgagor reassign and surrender the lands and all buildings to the mortgagor as he the mortgagor may direct."

10 6. The Appellant having made default in payment of the principal sums and interest due under the first and second mortgages and having failed to pay the ground rent and municipal rates in respect of the mortgage property and also having failed to pay the requisite insurance premium and the instalments and interest payable under clause (f) of the Third Mortgage, the first Respondent on the 2nd July 1953 sent him a notice under clause (e) requiring him to rectify such defaults within five weeks, failing which the first Respondent would take action to recover the principal sum and interest due under the Third Mortgage. The Appellant did not comply with the said notice.

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20 7. The trial of the action took place at Mombasa on the 29th and 30th July 1954 and the 23rd 24th and 25th August 1954 before the Honourable Mr. Justice Henry Mayers. The two defences relied on before the trial Judge were (a) that the Third Mortgage was invalid as regards one of the three parcels of land (that is, Plot 259) on the ground that the Appellant had no title to the said Plot 259 at the date of the execution of the Third Mortgage, and (b) that the action had been compromised by agreement between the first Respondent and the Appellant in September 1953. On the 11th November 1954 the learned trial Judge delivered judgment in favour of the first Respondent.

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40 8. By an Order dated the 15th November 1954 Henry Mayers J. directed that an account be taken by the Registrar and the amounts found due to the first second and third Respondents respectively be certified on or before 15th December 1954; that the Appellant should have three months from the date on which such account was delivered within which to pay all sums as might be found due upon such account; and in default of such payment within such period that a preliminary decree for the sale of the mortgaged property free from prior mortgages should be issued, followed by a final decree against the Appellant for the amount (if any) by which the sum realised upon

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such sale was insufficient to discharge the Appellant's liability to the first Respondent in full.

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9. By a Preliminary Decree for Sale dated the 21st January 1955 after declaring that the several amounts therein mentioned were due to the first second and third Respondents respectively under their respective mortgages it was decreed as follows:-

"(1) That if the Defendant No.1 pays into Court the three amounts so declared due on or before the said 15th day of March 1955, the Plaintiff and the Defendants Nos.2 and 3 shall deliver up to the Defendant No.1 or to such person as he appoints all documents in their possession or power relating to the properties under the said charges,

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(2) That if such payment is not made on or before the said 15th day of March 1955, the properties charged or a sufficient part thereof be sold and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment firstly of what is declared due to the Defendant No.2 as aforesaid, secondly in payment of what is declared due to the Defendant No.3 as aforesaid and thirdly of what is declared due to the Plaintiff as aforesaid, together with subsequent interest and subsequent costs

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(3) That if the net proceeds of the sale are insufficient to pay such amounts and such subsequent interest and costs in full, a Personal Decree be issued against the Defendant No.1 in favour of the Defendant No.2, Defendant No.3 and or the Plaintiff as the case may be, for the amount of the balance."

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10. By a Final Decree for Sale dated the 20th May 1955, after reciting that the payment directed by the said Preliminary Decree for Sale had not been made by the Appellant or any person on his behalf, it was ordered that (1) the properties charged in favour of the second third and first Respondents should be sold, (2) the moneys realised by such sale should be paid into Court and should be duly applied in

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payment of what was due to the second third and first Respondents as therein provided, and (3) if the net proceeds of sale were insufficient to pay the sums therein mentioned the second third or first Respondents as the case might be should be at liberty to apply for a personal decree for the amount of the balance.

10 11. The Appellant appealed to the Court of Appeal for Eastern Africa against the whole of the decision of Henry Mayers J. The Appeal was heard on the 19th and 20th March 1956 by the President (Sir Newnham Worley), Briggs J.A. and Bacon J.A. On the 27th March 1956 the Court gave judgment dismissing the Appeal with costs. p. 53 pp. 60-63 pp. 64-83 pp. 83-91

20 12. The judgment of the President of the Court of Appeal for Eastern Africa, with which the other members of the Court agreed, rejected the contention of the Appellant that no right to sell had arisen by reason of his defaults, on the following grounds :-

(1) Section 67 of the Transfer of Property Act 1882 so far as relevant provides as follows:

30 "In the absence of a contract to the contrary, the mortgagee has at any time after the mortgage-money has become payable to him a right to obtain from the Court an order that the mortgagor shall be absolutely debarred of his right to redeem the property, or an order that the property be sold."

(2) By virtue of clause (e) of the Third Mortgage the principal sum and interest thereby secured became due and payable by reason of the Appellant's defaults.

(3) The Statute clearly gives the mortgagee the right to an order for sale once it is shown that the mortgage money has become payable.

40. (4) The Third Mortgage contained no contract to the contrary. Clauses (e) and (f) do not destroy but only qualify the covenant to repay "on the 30th June 1968", and there is no difficulty in reading together the first covenant to repay with clauses (e) (f) and (h) so as to give effect to the intention disclosed

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by the deed as a whole.

pp. 63, 67,
72-3, 78-9

13. The Court of Appeal for Eastern Africa also rejected the submission of the Appellant that the suit had been compromised by agreement. The other grounds of appeal argued before that Court were (a) that the prior mortgagees should not have appeared or received costs against the Appellant, and (b) that the property should (if at all) have been ordered to be sold subject to the prior mortgages without directing payment or realisation of such prior mortgages. These grounds of appeal (being grounds 1 and 2 in the Notice of Additional and Reframed Grounds of Appeal) were rejected during the argument, and are not dealt with in the judgment of the learned President.

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pp. 90-91

14. The Appellant was given final leave to appeal from the judgment of the Court of Appeal for Eastern Africa by an Order of that Court made on the 27th February 1957.

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15. The Appellant respectfully submits that the judgment of the Court of Appeal for Eastern Africa, save in so far as it related to the alleged compromise of the suit, was erroneous on the grounds broadly stated in paragraph 3 hereof.

16. As regards the first ground of appeal, the Appellant respectfully submits as follows:

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(a) The first covenant for repayment contained in the Third Mortgage is a covenant to repay the principal sum "on the 30th June 1968". That covenant contained by necessary implication a negative stipulation that the mortgagee would not sue for the principal sum before the specified date: see Bolton v. Buckenham [1891] 1 Q.B. 278, per Lord Esher M.R. at p.281.

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p. 109

(b) The proviso for redemption contained in clause (h) of the Third Mortgage, on its true construction, imposes no obligation on the mortgagee to reconvey the mortgaged property until after the expiry of the stipulated date i.e. the 30th June 1968, and, therefore necessarily implies that no liability to make and no right to demand full repayment of the mortgage moneys could arise before that date, it being of the essence of every mortgage transaction that on complete discharge of the

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mortgage debt the mortgagee must reconvey or release the mortgage security.

p. 107

10 (c) Clause (e) of the Third Mortgage is repugnant to the preceding covenant for repayment since it would destroy both the obligation of the mortgagor to repay the principal sum on the 30th June 1968 and the obligation of the mortgagee not to sue for the principal sum before that date. The principle of law is that if in a deed an earlier clause is followed by a later clause which destroys altogether the obligation created by the earlier clause, the later clause is to be rejected as repugnant and the earlier clause prevails: see Forbes v. Git [1922] 1 A.C. 256, at p. 259.

20 (d) The proviso for redemption contained in clause (h) shows that the security provided by the Third Mortgage was intended only to secure repayment of the principal sum by the 30th June 1968. Accordingly, effect can be given to clause (e), if at all, and to clause (f), only by treating them as a contract, collateral to the mortgage security, and giving to the mortgagee no more than a right to a personal judgment. The first Respondent has not in these proceedings sought a personal judgment under clause (e) for the whole of the mortgage money or under clause (f) for the unpaid instalments.

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(e) There is no jurisdiction to order a sale of the mortgaged property under section 67 of the Transfer of Property Act 1882 except in circumstances in which it would be proper to make an order for foreclosure. No right of foreclosure arises until some condition of the proviso for redemption has been broken and the mortgagee's estate has become absolute at law: see Williams v. Morgan [1906] 1 Ch. 804, per Swinden Eady J. at p. 807. The Appellant has not broken the condition of the proviso for redemption contained in clause (h).

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17. If the first ground of appeal fails, the Appellant will respectfully submit that the Order dated the 15th November 1954 and the Preliminary and Final Decrees for Sale were erroneous, and ought to be discharged or varied as hereinafter mentioned, for the

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following reasons:

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pp. 54-58

(i) The Order dated the 15th November 1954 and the Preliminary Decree for Sale directed the mortgaged property to be sold if the Appellant did not pay into Court the amounts due under all three mortgages, whereas by virtue of section 88 of the Transfer of Property Act 1882 the sale of the property should have been directed only upon the default of the Appellant in paying into Court the amount due under the Third Mortgage, which consisted at most of the unpaid instalments and arrears of interest. 10

(ii) The second and third Respondents did not claim, and were not entitled to, any relief in the action. Accordingly, no account should have been directed as to the amounts due to them, and, in any event, neither of them is entitled to a personal decree against the Appellant in this action. 20

(iii) The Preliminary Decree for Sale was erroneous in declaring that the sums certified by the Registrar should carry interest at the rates therein mentioned until realisation. Interest was and is payable only on the principal sums secured by the three mortgages and at the rates thereby respectively reserved.

(iv) The second and third Respondents, even if proper parties to the action, could not have been prejudicially affected by any order made in the Action, and there was no need for them to be represented at the trial. Accordingly, no provision should have been made for the payment of their costs of the action. 30

18. The Appellant accordingly submits that the Order herein of the Court of Appeal for Eastern Africa ought to be reversed, and that (A) if the first ground of appeal succeeds, an Order ought to be made discharging the Order dated the 15th November 1954 the Preliminary Decree for Sale and the Final Decree for Sale and dismissing the Action with costs here and below; and (B) if the first ground of appeal fails, an Order ought to be made (i) discharging the Preliminary and Final Decrees for Sale (ii) varying the Order of the 15th November 1954 so as to direct only an account 40

10 of what is due to the first Respondent in respect of unpaid instalments under clause (f) of the Third Mortgage and arrears of interest and to provide for a preliminary decree for sale to be made on default by the Appellant in paying the amount so found due within three months after the filing of such account in the Supreme Court of Kenya at Mombasa District Registry, and (iii) making provision for the costs of this Appeal and of the proceedings below: or in the alternative, discharging the Final Decree for Sale and varying the Order dated the 15th November 1954 and the Preliminary Decree so as to direct a sale of the mortgaged property only in the event of default by the Appellant in paying into Court the amount declared in the said Preliminary Decree to be due to the first Respondent together with subsequent interest and costs within three months from the date of the Order making such variation. These submissions are based on the following (among other)

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R E A S O N S

(1) BECAUSE the Third Mortgage, on its true construction, operated only to create a security for the repayment of the mortgage money by the 30th June 1968

30 (2) BECAUSE clause (e) of the Third Mortgage is void as being repugnant to the preceding covenant for repayment, or, alternatively, operates only to give the mortgagor a right to a personal decree in proceedings brought for that purpose

(3) BECAUSE the non-payment of the instalments of principal under clause (f) of the Third Mortgage involved no breach of the condition of the proviso for redemption in clause (h)

40 (4) BECAUSE the mortgagor's legal or contractual right of redemption still subsists and no right to sue for foreclosure or sale pursuant to section 67 of the Transfer of Property Act 1882 has accrued to the first Respondent

(5) BECAUSE, if the first Respondent is entitled to an order for the sale of the mortgaged property, such order should issue only

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on default by the Appellant in paying into Court the amount due under the Third Mortgage.

(6) BECAUSE the Order dated the 15th November 1954 and the Preliminary and Final Decrees for Sale made in the Court of first instance contravened the relevant statutory enactments and were otherwise irregular for the reasons stated above.

H.E. FRANCIS

IN THE PRIVY COUNCIL

No. 6 of 1957

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B E T W E E N :

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(Third Defendant) Respondents

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