

Sheth Mancklal Mansukhbhai - - - - - *Appellant*

v.

Sheth Chimanlal Kalidas and others - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT BOMBAY

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 14TH DECEMBER, 1942.

Present at the Hearing :

LORD MACMILLAN

LORD WRIGHT

LORD PORTER

SIR GEORGE RANKIN

SIR MADHAVAN NAIR

[*Delivered by LORD PORTER*]

By this appeal it is sought to restore an order dated the 31st March, 1937, of the First Class Subordinate Judge at Ahmedabad whereby he ordered in favour of the appellant (the decree holder) the execution of a compromise decree of the 6th July, 1932, passed in his favour against the respondents the judgment debtors. The order of the Subordinate Judge was affirmed by the High Court in a First Appeal but reversed in Letters Patent Appeal No. 34 of 1937 in which the appellant's application was dismissed.

The facts giving rise to the present litigation were as follows:—

On the 24th February, 1921, the respondents or their predecessors executed a registered mortgage deed in favour of the appellant as security for a loan of Rs.1,25,000 and interest thereon at the rate of 8 per cent. per annum, with yearly rests. The mortgage deed contained a personal covenant by the mortgagors for repayment.

On the 24th February, 1930, the appellant instituted a suit to enforce the mortgage by sale of the mortgaged properties claiming Rs.2,19,501 as principal and interest then said to be due, together with future interest charges and costs.

On the 6th July, 1932, this suit was compromised and a decree passed by the Subordinate Judge at Ahmedabad.

The present dispute turns upon the true construction of this decree which is, so far as is material, in the following terms.

" 1. On the date the 20-2-1930 when the Plaintiff filed the suit the sum payable by the defendants to the Plaintiff is Rs.1,98,446-14-4 One Lac ninety eight thousand four hundred and forty-six, annas fourteen and pies four. The same may be recovered from the defendants personally and by sale of their mortgaged property with compound interest at the rate of Rs.six per cent. per year with (Annual rest) from the date of the suit until payment.

" (1) But in case the defendants pay moneys to the plaintiff in accordance with the conditions mentioned in paragraph 2 below, the plaintiff is to give remission for the rest of the amount and to admit full payment of this decretal claim and to note an endorsement of full satisfaction on the mortgage Deed and to get the suit recorded in the register after endorsing satisfaction on the decree.

" (2) The conditions on which the Plaintiff is to give remission and is to endorse satisfaction on the mortgage-Deed and the decree as mentioned in paragraph 1 above as follows:—

" A. Unless the period is extended for the reasons mentioned in paragraph B below the Defendants are to pay Rs.1,31,000/- in words Rupees One Lac thirty-one thousand as first instalment on or before 4-1-1933.

" B. If for the purpose of paying the aforesaid sum of Rs.1,31,000/- to the Plaintiff, the Defendants desire to borrow moneys from anyone else and to mortgage the mortgaged property to him as security for the same, the Plaintiff is to give a legal undertaking at the Defendants' costs for giving a first charge that is to say ' priority ' to such other (new) mortgagee for the said sum. If the Plaintiff makes default or causes delay in giving such undertaking, then as much time as may be lost as a result of the default or delay on the part of the Plaintiff shall be allowed to the Defendants after 4-1-1933 for payment of the sum mentioned above.

" C. After the date on which as mentioned above Rs.1,31,000/- in words Rupees One Lac and thirty-one thousand (which) shall be called the aforesaid sum in this (paragraph) shall be paid within the period mentioned above, the Defendants shall pay to the Plaintiff the total sum of Rs.44,000-0-0 in words Forty-four thousand in the following instalments:

" (1) Rs.11,000/- in words Rupees Eleven thousand within one year from the last date of the payment of the aforesaid sum as mentioned in paragraph 2 A & B.

" (2) Rs.11,000/- in words Rupees Eleven thousand within two years from the last date of the payment of the aforesaid sum as mentioned in paragraph 2 A & B.

" (3) Rs.11,000/- in words Rupees Eleven thousand within three years from the last date of the payment of the aforesaid sum as mentioned in paragraph 2 A & B.

" (4) Rs.11,000/- in words Eleven thousand within four years from the last date of the payment of the said sum as mentioned in paragraph 2 A & B.

" D. In case the Defendants fail to pay the moneys which the Defendants have to pay as mentioned in paragraphs A, B and C on the dates mentioned (therein), then they are to get only one month's time as grace in addition to the period in respect of each instalment and in case the Defendants fail to pay the monies on the dates on which they are to be paid after calculating the days of grace, then the dates and the time fixed under this application of compromise being of " Essence " the Defendants will be considered to have committed breach of the conditions and on such breach being committed the Plaintiff shall be entitled to recover the whole amount mentioned in paragraph 1 without giving any remission. Each party to bear his own costs."

After the recording of this decree, no further step was taken by either side until the 1st February, 1933, when the respondents' pleader sent a letter to the appellant in the following terms:—

" I am addressing this letter to you on behalf of my clients Anubhai Kalidas and others.

" As per terms of the compromise decree passed in Civil Suit No. 214 of 1930 a sum of Rs.1,31,000/- One lac and thirty-one thousand becomes payable to you on 4-2-1933, my client has already arranged for a loan from the third party in order to pay off this amount. Under the decree you have to give the kabulayat for giving the said new mortgagee property.

" I have to request you therefore to send me the said kabulayat as well as the title deeds of the mortgaged property which are with you, so as to enable my clients to get their property inspected by the intending lender. It is natural that the intending lender should be keen on having the title deeds and the said kabulayat from you. Your attention is invited to the clause in the decree that the delay caused by you in giving the necessary kabulayat will be on your account."

To this letter no reply was sent nor was any step taken until on the 4th September, 1933, the appellants' pleader wrote to the respondents' pleader stating that the respondents were to pay Rs.1,31,000 by the 4th January, 1933, and with the days of grace by the 4th February, 1933, and the remaining sum by instalments of Rs.11,000: that they had not paid any part of the decretal amount. The letter then called upon them in compliance with the decree to pay the amount to the appellant within 15 days from its receipt. In default, execution of the decree was threatened.

The respondents' pleader answered on the 14th September, 1933. He referred to his letter of the 1st February, stated that his client had already arranged for a loan from a third party in order to pay off the mortgage debt, contended that the appellant had to give a legal undertaking or kabulayat for giving the new mortgagee a priority, and that it was necessary that the title deeds should be shown to the new mortgagee, stated that all delay caused by the failure to give the kabulayat and to furnish the title deeds would be attributable to the appellant, and asked that both should be sent.

This letter was followed by another dated the 22nd December saying that arrangements had actually been made for a loan, that negotiations were complete and only a short time was required to put everything into effect and asking again for the title deeds. The appellant's pleader replied on the 1st February, 1934, that the respondents were already in default, but that without prejudice to his right to execute the decree for the whole amount the appellant was prepared to give inspection of the title deeds within 48 hours.

As a result a final letter dated the 2nd February, 1934, was received from the respondents' pleader to the effect that the delay was due to the appellant's failure to act up to his part of the decree, that 48 hours was unduly short and that when a convenient date for inspection had been ascertained a further communication would be sent.

A week later the appellant filed his application for execution in respect of the full sum mentioned in the compromise decree, on the grounds that the respondents had not fulfilled the conditions therein contained under which the smaller sum payable by instalments was to constitute a full discharge. The learned Subordinate Judge upon this application held him entitled to execute the decree for the sum of Rs.2,51,050.10.10 and this decision was affirmed by Divatia J. on appeal, but reversed in the Letters Patent appeal on the ground that the appellant had failed to furnish the required kabulayat and therefore the delay in payment was his and not the respondents' fault.

The respondents were represented before each of the three Courts below but not, unfortunately, before their Lordships' Board. The matter is however purely one of construction and has been fully presented to them and they have had the advantage of hearing the views held by the three Courts below.

Before their Lordships the appellant took two points: (1) That the respondents' right to require the kabulayat to be given came to an end on the 4th January, 1933, and therefore a demand for it sent on the 1st February was too late. (2) That even if it were in time, the letter did not contain the name of the would-be lender with the result that the kabulayat could not be completed in due form or sent to him as provided by the decree and that in any case there was no justification for a demand that the deeds should be sent.

As their Lordships are satisfied that the appellant is right upon the first point, they do not propose to determine how far, if at all, the second contention can be supported.

The argument presented on behalf of the appellant was that the provisions of clause 2 of the compromise decree are divisible into two parts. The first, which is to be found in the three paragraphs A, B, C, sets out the dates by which the agreed instalments have to be paid if the debtor is to escape liability for the total sum claimed to be due. The second is contained in paragraph D and gives a month's grace for payment, that month starting from the dates already determined by the earlier paragraphs. The date stipulated for the payment of the first instalment is the 4th of January, 1933, though if the appellant is guilty of delay in furnishing the kabulayat when asked for then the respondents are to have so much additional time as they have lost owing to the default of the appellant in failing to provide that undertaking.

It is true that a month's grace is granted for payment of the money required, beyond the date at which it would otherwise be due. The month's grace however as the appellant contended is only given after the primary date for payment has first been ascertained, and that date must either expire on the 4th of January or on some later day to which an extension is given as a result of a failure by the appellant to perform his part in due time. The grace merely extends the date of payment for one additional month after the primary date has been fixed. It has no bearing upon the time at which steps must be taken to fulfil the other conditions specified in the decree.

The case for the respondents on the other hand, as appears from the decision of the Appellate Court, is that paragraph D gives a month's extension for all or any of the requirements found in the three earlier paragraphs and provides that he shall have up to the 4th February for payment and therefore shall have up to that date for taking any steps necessary for raising the funds required to effect that object.

If the second had been the intention with which this clause was framed, it is difficult to see why it took the form actually adopted. It would have been easy to say that payment was to be made by the 4th February with a proviso for an extension of time in case the decree holder failed to carry out his obligations in due time.

If the respondents' view were right the provision first for a method of calculating the day on which payment is *prima facie* to be made and secondly for giving a month's grace for payment thereafter seems unduly complicated. If on the other hand the object of the clause is first to find the due date for payment and then, but not till then, to grant a month's extension beyond the date so ascertained, the reason for adopting the form actually employed is clear enough. The shape into which its provisions are cast is more in accordance with an intention to give days of grace after a calculated or calculable day for payment has been reached than with an intention of granting an extension of time to the debtor in order to enable him to raise funds to pay off the mortgage. It would not be unnatural to require the kabulayat to be asked for before the 4th of January even though the money need not be paid until a month later. Time would be required to obtain the necessary funds from the new mortgagee, and if the kabulayat were given or at any rate asked for before the 4th January the sum required for repaying the mortgage debt and interest might be expected to be forthcoming by the 4th of February.

A further ground for preferring the construction put upon the clause by the appellant is that the proviso to section B granting the extension of time for payment in case of the appellant's default speaks of the 4th January and not the 4th February as the time after which the extension is to be allowed, whereas on the respondents' argument if any unjustified delay in furnishing the kabulayat takes place between the 4th January and the 4th February though none has occurred before the former date the respondents are to have the benefit of it. So far from this being the case, paragraph D clearly distinguishes between (i) the date mentioned in paragraphs A, B and C—i.e., the 4th January or such extended date after the 4th January as is provided for in B; and (ii) the month's grace given for payment of each instalment, an extension which must have some date already ascertained or ascertainable from which it is to be calculated. To find the time at which the period of grace expires, it is first necessary to know when it begins, and its beginning is provided for in paragraphs A, B and C. D merely states its length and sets out the result of a failure to make payment even after the additional period has expired. The respondents may pay after the 4th January provided they do not delay beyond the 4th February, but they must fulfil the other conditions before the earlier date.

Both the Subordinate Judge and Divatia J. in the High Court assume that a genuine request for a kabulayat in the proper form would be in

time if asked for before the 4th February, 1933, but as they both decided against the respondents' contention on other grounds it was unnecessary for them to pronounce upon the question.

On appeal it became material for the High Court, who found in favour of the respondents on the other argument presented to them, to decide this point also. In their view, inasmuch as the respondents were given one month's extra period in which to pay the first instalment, they would be entitled to raise the loan within that period, and therefore the appellant's obligation to give the kabulayat within the same period would necessarily continue. With all respect to the views of the learned Judges of the Appellate Court, their Lordships are unable, for the reasons they have already given, to accept this view.

As they have indicated, the time given to the respondents for informing the appellant of their desire to borrow moneys and to mortgage the mortgaged property to any one else in order to secure this loan, and for requesting him to give the kabulayat to enable the loan to be obtained, expired on the 4th January, 1933. A failure to comply with a request to furnish this document made after that date would not constitute a default on the part of the appellant or extend the time for payment. The time for making the request ended on the 4th January: the time for payment alone was enlarged. It follows that after the 4th February the respondents were in default. They failed to pay within the stipulated time the moneys which they had to pay under paragraph A of the compromise decree and also those due under paragraphs B and C. The appellant is therefore entitled to recover the whole amount mentioned in paragraph 1 of that decree without giving any remission.

In accordance with this view their Lordships will humbly advise His Majesty that the appeal should be allowed and the judgment of the Subordinate Judge and of Divatia J. restored. The respondents must pay the appellant's costs before their Lordships Board and in the Courts below.

In the Privy Council

SHETH MANCKLAL MANSUKHBHAI

v.

SHETH CHIMANLAL KALIDAS AND
OTHERS

DELIVERED BY LORD PORTER

Printed by His Majesty's Stationery Office Press,
DRURY LANE, W.C.2.

1943