

(1873) 03 CAL CK 0001

Calcutta High Court

Case No: None

The Bank of Hindustan,
China and Japan

APPELLANT

Vs

Nundololl Sen and
Others

RESPONDENT

Date of Decision: March 27, 1873

Judgement

Macpherson, J.

This suit having come on for settlement of issues, the matters in dispute between the parties have been argued, and it is agreed by Mr. Woodroffe and Mr. Evans, and is clear, that it is unnecessary to set the cause down for further hearing. I think that the suit will lie leave to sue in this Court was obtained when the plaint was filed, and therefore under the peculiar state of facts shown by the plaint, the suit will lie, though some of the properties which are the subject of it are situated in the mofussil.

2. But the suit being here, it is impossible that, in foreclosing the mortgages of the lands which lie out of Calcutta, I should follow the procedure prescribed by the Regulations for the foreclosure of mofussil mortgages. This Court has no means of carrying out a foreclosure under that procedure. At the same time (on the principles indicated in the case of Doed Chuttoo Sheick Jemadar v. Subbessur Sein 2 Boul., 151), I ought to see that the defendant is not by reason of the suit being brought in this Court deprived of any substantial advantage which he would have had if the suit had been instituted in a Court in the mofussil. For example, as the defendant, if sued in the mofussil, would have had what is called his year of grace within which he might redeem, so here he should have a full corresponding year allowed him before making the foreclosure absolute. The parties having contracted in the English form, there is no hardship or injustice to the defendant in dealing with the case in the manner in which I propose to treat it. It is true that, to a certain extent, mortgages of lands in the mofussil, drawn up in the English language and in the form of an ordinary English mortgage, have been treated as common bye-bil-wafas, or deeds of conditional-sale. But that has been merely with reference to the one question of the procedure to be gone through in order to obtain foreclosure. In an ordinary Bengali

bye-bil-wafa it appears on the face of the document itself that the parties intend that, if the mortgagor does not pay the money due, the conditional sale shall become absolute, and the property shall remain finally with the mortgagee in lieu of the debt. Where such intention is apparent, the mofussil Courts have held, and with good reason, that the creditor must look to the land only, and has no remedy against the other property, or the person of the mortgagor. But the intention and contract are wholly different in a mortgage in the common English form, where personal and general liability is always contracted for, in addition to the security afforded by the mortgage of the land.

3. It seems to me there is nothing in the argument that, because some of the earlier mortgages have been foreclosed by reason of the non-payment of this same debt, therefore the debt is now to be deemed to be satisfied. Whether it is so or not, according to English law, in an ordinary and simple case, where there is but one debt and one security, to apply such a rule, in an exceptional case like the present, would be wholly inequitable and wrong, as being contrary to the express intention of the parties as testified in the several deeds executed by them.

4. The Regulations which lay down the law on the subject of mortgages to be applied in the Courts in the mofussil never contemplated a case like this now before me; and they make no provision for such a case. No mofussil Court in truth has any machinery with which to deal properly with such a matter as this.

5. In my opinion the English law does not indicate that the plaintiffs' right to recover their money in one way or other would be barred by the foreclosures which have been already obtained; although no doubt the institution of this suit would reopen the foreclosures, and let the defendant in to redeem. I quite think that, if the defendant now chooses to pay off the debt, the foreclosures should be set aside, and doubtless the plaintiffs will be well pleased to be paid off on such terms.

6. There is no question that now the position of the parties is thoroughly complicated and exceptionable. It is impossible to value properties which have been foreclosed until the plaintiffs get possession of them, and therefore I look upon it as essential that the plaintiffs should take all necessary steps without delay to complete their foreclosure by getting possession. Once they are in possession, it will be possible to ascertain how far the debt should be treated as paid off by these foreclosures till that is done, it is impossible to say how the account really stands between the parties, and impossible to proceed to deal with the properties mortgaged in the latter deed, which is the basis of this suit.

7. I shall direct an account of what is due on the mortgage, and that (in order to the taking of that account) the plaintiffs do at once take all necessary steps towards getting possession of the properties which they have foreclosed; and that the defendant do all things in his power to give full and beneficial possession to the plaintiffs, and to assist them in obtaining it. Then there will be an enquiry as to the value of the properties of

which the plaintiffs shall get possession, and as to the value of the Tangra property of which they have already got possession; and when these values have been ascertained, the account must be finally taken. If, on the taking of that account, there is a balance due from the defendant, then the decree will direct foreclosure, allowing the ordinary period of six months for the Calcutta properties, and one year for those in the mofussil⁽¹⁾.

(1) The defendant Nundololl appealed on the following grounds:--That the Judge had no jurisdiction to make the decree; that he was wrong in holding that he was at liberty to apply the principles and procedure of English Equity Courts to mortgages of land out of the jurisdiction of the Court; that the Judge had omitted to decide whether the plaintiffs were entitled to the relief in the plaint prayed for, without proceeding against the properties in respect of which they did not ask relief, or abandoning their rights against the same; that it ought to have been held that the plaintiffs by proceeding against the property mortgaged had lost all right to proceed under the covenants of the said mortgages or under the bond; that the Judge was wrong in holding that the principles applicable to mortgages of mofussil property by bye-bil-wafa were not applicable to the mortgages of the mofussil property; that the whole frame and scope of the suit was erroneous and misconceived, and ought to have been dismissed; that if the Court had jurisdiction over the subject-matter of the suit, and if any portion of English law was applicable, the Judge ought to have declared that the former foreclosures had been reopened by the sale in execution of the Goriffa house, and other sales and proceedings, and ought to have taken the account independently of the said foreclosures; that the principle of valuing foreclosed property, in order to make up an account of what is due on a mortgage, was a principle unknown alike to English and Hindu law, and was wholly erroneous; that the plaintiffs had by their own acts disabled themselves from obtaining the relief sought for; that if the Judge had power to make a decree which allowed the former foreclosures to remain undisturbed, and which ordered foreclosure of the remaining property, he could not equitably have made such decree, except on the terms of the plaintiffs restoring to the defendant his dwelling-house at Goriffa; that the Court, having found that the plaintiffs had rendered it impossible for the Court to take an account in the present state of things, should, if he granted any relief, have done so only on the terms of the plaintiffs paying the defendant's costs; and that at any rate the defendant ought not to have been ordered to pay the plaintiffs' costs.

The appeal came on for hearing on May 12th, 1873, before Couch, C.J., and Pontifex, J.

Mr. Kennedy and Mr. Evans for the appellant.