APPELLATE CIVIL.

Before U Tun Byu and U Aung Tha Gyaw, JJ.

H.C. 1948

Feb. 16.

TAN BYAN SENG (APPELLANT)

v.

ELLERMANS ARRACAN RICE AND TRADING COMPANY, LIMITED AND ONE (RESPONDENTS).*

Transfer of Property Act, s. 69—Power of Sale—Deed giving power to mortgagee "to buy in, or rescind or vary the Contract of Sale and to resell without being responsible for any loss"—Meanings of words "buy in" and "resell"—Power of mortgagee to buy on his own account—If valid—Mortgagee when selling mortgaged property under a power of sale if an agent—S. 215, Contract Act—Rules interpretation of legal documents.

Held: That s. 69 (3) (4) of Transfer of Property Act does not authorize the mortgagee exercising power of sale to purchase the property for himself. The expression "buy in" has acquired a definite meaning and means "to buy back for the owner at an auction." This expression in effect empowers the mortgagee at whose instance the auction is held to take the property out of auction, if adequate price is not obtained. The word "resell" does not imply a previous "effective sale." It is consistent with sale in outward appearance by which a mortgagee apparently purchases to save the property from being sold at a low price. These expressions do not authorize the mortgagee to buy the property either directly or indirectly on his own account.

Mulraj Virji v. *Nainmal Pratapchand*, I.L.R. (1942) Bom. 83 at pp. 92-3; *Downes* v. *Grazebrook*, (1817) 36 E.R. 77 at p. 80; *National Bank of Australia* v. *The United Hand-in-Hand and Bank of Hope Company*, (1878-79) 4 A.C. 391; *Martinson* v. *Clowes*, (1882) 21 Ch.D. 857, *Hodson* v. *Deans*, (1903) 2 Ch.D. 647, followed.

Held further: That the mortgagee in exercising the power of sale acts in his own right and not as the agent of the mortgagor and s. 215 of Contract Act has no application in a purchase by mortgagee in the exercise of his power of sale.

Achutha Naidu v. *Oakley Bowden & Co.*, I.L.R. 45 Mad. 1005, referred to.

Held further: That one who reads a legal document, whether public or private, should not be prompted to ascribe, should not, without necessity or some sound reason, impute to its language tautology or superfluity, and should be rather at the outset inclined to suppose each word intended to have some effect, or be of some use.

Ditcher v. *Denison*, (1856) 11 Moore (P.C.) 325 at p. 337, followed.

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* Civil 1st Appeal No. 21 of 1947 being appeal against the decree of the Original Side of the High Court of Judicature at Rangoon in Civil Regular No. 58 of 1941, dated the 3rd December 1941.

P. K. Basu for the appellant.

E. C. V. Foucar for respondent No. 1.

The judgment of the Bench was delivered by

U TUN BYU, J.—The brief facts are that the 2nd defendant, Tan Byan Seng, who is the appellant, executed, on the 8th April, 1932, an instrument which might be described as an anomalous mortgage, in favour of the plaintiff Messrs. Ellermans Arracan Rice and Trading Company, who is the 1st respondent in this appeal, making certain house properties, which are situated in Rangoon, as security for a sum of Rs. 50,000 due by the 2nd defendant. The mortgage deed of the 8th April, 1932, confers a power of sale without the intervention of the Court on the plaintiff. On the 26th October, 1938, the plaintiff gave a notice to the 2nd defendant of its intention to exercise its power of sale without the intervention of the Court in case of default of payment of the amount due to it. The plaintiff, in pursuance of its power of sale, next instructed Messrs. Balthazar & Sons to place the mortgaged properties for sale by auction. The first attempt to sell the mortgaged properties by auction, which was fixed on the 10th April, 1940, was without success, but subsequently, on the 17th July, 1940, the mortgaged properties were again put up for sale by auction and were purchased by the representative of the plaintiff, as the highest bidder, for Rs. 8,750. The plaintiff, by an instrument dated the 9th November, 1940, executed a conveyance of the mortgaged properties to itself, which was registered on the same date. The 1st defendant, who is the 2nd respondent in this appeal, was a tenant of the 2nd defendant who is the appellant in this appeal. The plaintiff, relying on its title which was said to have been obtained by it under

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the instrument dated the 9th November, 1940, attempted to get the 1st defendant to attorn as a tenant to the plaintiff, but this was without success; and the plaintiff, on the 13th March, 1941, filed a suit for possession of the premises in Canal Street, which was one of the mortgaged properties, against the 1st defendant, who was at that time in possession of that premises. On the 19th June, 1941, the 2nd defendant was added as a party to the suit. A decree was passed on the 3rd December, 1941, against the defendants with costs. The 2nd defendant filed the present appeal against the said decree.

It might be mentioned that the records, both of the Original Side and of the appeal proceedings, had been lost—perhaps, during the Japanese military occupation of Burma. Fortunately, a copy of the judgment of the Original Side is available, and the judgment appears to furnish all the materials that are required for the decision of this appeal.

It is contended on behalf of the 2nd defendant, who is the appellant in this appeal, that there is nothing in the mortgage deed of the 8th April, 1932, to empower the plaintiff, who is the 1st respondent, to purchase the mortgaged properties for itself; and it is also contended that even if the mortgage deed of the 8th April, 1932, had conferred on the plaintiff the power to purchase the mortgage properties at a sale held without the intervention of the Court, that power to purchase would be invalid in law, and that the sale contemplated under section 69 of the Transfer of Property Act is sale to a third party.

The material part of the mortgage deed of the 8th April, 1932, is as follows:

"That if the mortgagee (plaintiff) shall serve a notice in writing on the mortgagor (2nd defendant) requiring him to pay up the money for the time being owing on this mortgage and

default shall have been made in payment of such or some part thereof for three calendar months from the time of serving such notice it shall be lawful for the mortgagee *to sell* the said mortgaged lands and premises either by public auction or private contract and subject to such stipulations as to title or otherwise as the mortgagee may think necessary and *with power to buy in* or rescind or vary any contracts for sale *and to re-sell without being responsible for any loss occasioned thereby* and with power also to sign and register assurances to give effectual receipts for the purchase money and do all other acts and things for completing the sale which the mortgagee shall think proper."

The most material words are italicized.

The first point which arises in this appeal is whether the expression "with power to buy in", italicized above, if read with the context in which that expression appears, means "to buy back for the owner", as urged on behalf of the appellant; or does it mean as observed by the learned Judge in the judgment dated the 3rd December, 1941, which is as follows :

"In the events I have mentioned you may either instruct an auctioneer to sell my property or you may sell it yourself by private treaty. If you choose the former course you may yourself bid and purchase : if the latter you may, as far as I am concerned, cancel or vary the sale contract : in the former event you may resell it and in the latter you may again offer it for sale, without in either case being responsible for any resulting loss."

It is difficult to follow how it can, in this case, be said that the word "in" in the expression "to buy in" is superfluous, if the expression "to buy in" is read literally. It has been observed by the Judicial Committee in the case of *Ditcher* v. *Denison* (1)—

"It is also a good general rule in jurisprudence that one who reads a legal document, whether public or private, should not be prompted to ascribe, should not, without necessity or some sound reason impute to its language tautology or superfluity, and should

(1) (1856) 11 Moore (P.C.) 325 at p. 337.

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be rather at the outset inclined to suppose each word intended to have some effect, or be of some use."

This rule of interpretation still holds good, and it is clearly based on good sense; and we ought to keep this rule of interpretation constantly in view when attempting to construe what the expression "to buy in" means. There does not appear to be anything in the context which suggests that the expression "to buy in" can be said to indicate that the word "in" ought to be regarded as a superfluity, particularly in view of the words that follow it. On the other hand, the expression "to buy in" has acquired a definite meaning—"to buy back for the owner"—so far as the sale at an auction is concerned. In Chambers' 20th Century Dictionary, the expression "to buy in" means to buy back for the owner at an auction; in the King's English Dictionary, the meaning is given as "to purchase for the owner at the sale by auction"; and in Murray's Oxford Dictionary, it means to buy back for the owner, especially at an auction when no sufficient price has been offered. It will thus be observed that the expression "to buy in" has acquired the meaning "to buy for the owner at an auction sale", in so far as the sale at an auction is concerned.

The power of sale without the intervention of the Court given in section 69 of the Transfer of Property Act is exercised in this country, more often than not, through an auctioneer. The expression "to buy in" appears to be also well-known in English law. It appears in section 11 of Lord Cranworth's Act of 1860, in section 19 of the Conveyancing Act of 1881, and in section 101 (*1*) of the Law of Property Act, 1925. Thus the expression "to buy in" has been used in English statutes as far back as 1860.

In this connection the following passage may also be quoted from *Mulraj Virji* v. *Nainmal Pratapchand* (1):

"No mortgagee has a right to buy the mortgage premises without an express authority from the Court. If he attempted to buy directly or indirectly, on proof that the transaction was of that nature, the Courts have always held that the mortgage subsisted and the transaction of sale was a nullity. I do not think the expression 'buy in' has ever been intended to give the mortgagee that right. It should be realized that if at an auction sale there are several intending purchasers and the highest bid is very inadequate, a way has to be found by which the property is not sold to the highest bidder and cause a tremendous loss both to the mortgagor and the mortgagee. The expression 'buy in' is therefore used so that in effect the party at whose instance the auction is held takes the property out of the auction. The only way in which the auction can be closed is by such an offer being given and the property not being knocked down to an outsider. The expressions used after the words 'buy in' make this position very clear. The mortgagee is given a right to buy in or to rescind, *i.e.* to set aside the contract of buying or vary any contract for sale and to resell the same. Therefore when an auction sale is found not to result in realizing the proper value, the mortgagee may either postpone the sale, or if he finds that he is unable to do, so because the auction sale had started, he has to resort to the second way to prevent the property being knocked down at an undervalue and to resell the same. I do not think, on a true interpretation, the clause relating to the power of sales gives the mortgagees a right to buy the property for themselves."

The learned Judge, who tried the present case, observed in the judgment that "If the only effect of 'buy in' is to cancel a proposed sale there never has been a sale at all, and you cannot 'resell' what has never been sold." It is also urged on behalf of the plaintiff that the word "resell" connotes that there is a prior concluded sale, and the word "in" in the expression "to buy in" is accordingly superfluous

(1) I.L.R. (1942) Bom. 83 at pp. 92-93.

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as that expression ought to be given a meaning consistently with the word " resell " which follows it. The word " resell " according to—(i) the Chambers, 20th Century Dictionary, means to sell again ; (ii) the King's English Dictionary, means to sell again ; to sell what has been bought and sold ; and (iii) Murray's Oxford Dictionary, means to sell again. It is clear however that, where a property is purchased at an auction by another person to save the property from being sold at a low price, there was in that case, at least in outward appearance, a transaction which amounted to a sale, although the transaction might not amount to an effective sale. It is therefore difficult to see how the word " resell " can strictly be said to be altogether inapplicable to a transaction where a property is bought by someone to save it from being sold at a low price. Thus the word " resell " in the context which follows the expression " to buy in " is quite consistent, or at least not inconsistent, with the expression " to buy in ", which precedes the word " resell ". In the circumstances, it must be held that the expression " to buy in " cannot be construed to give the mortgagee, *i.e.* the plaintiff, a power to purchase the property for itself. The omission of the word " to " between the expressions " buy in " and " resell " in section 6 of the Trustee and Mortgagee's Powers Act does not appear to have any real bearing on the construction of the expression " to buy in " in the mortgage deed in question.

It has been urged on behalf of the plaintiff that even if the mortgage deed did not expressly give power to the plaintiff as mortgagee to purchase the property itself, the plaintiff could still buy the property for itself independently of such power, in view of section 69 of the Transfer of Property Act, read with section 215 of the Contract Act. The contention is that where a power

of sale is conferred, a mortgagee has also the power to buy the mortgaged property for himself, and that, in any case, the power to buy the property should be implied.

It is contended that where the purchaser and the mortgagee exercising the power of sale is one and the same person, the provisions of sub-section (*3*) of section 69 of the Transfer of Property Act would still apply. It appears, however, that sub-section (*3*) and sub-section (*4*) of section 69 of this Act ordinarily contemplate the existence of three parties, *viz.* the mortgagor, the mortgagee and the purchaser. It is thus difficult to see how it could be said that the provisions of sub-section (*3*) or sub-section (*4*) give the mortgagee the power to buy the property over which he had exercised the power of sale. Such a construction would not be warranted by the plain wordings of either sub-section (*3*) or sub-section (*4*) of section 69.

It is further contended that there is nothing illegal, so far as the law in Burma is concerned, for the mortgagee to buy the property sold at an auction sale under a power of sale given to him under the instrument of mortgage in view of section 215 of the Contract Act, which section, according to the plaintiff, creates a departure from the English law under which a mortgagee who had been given a power of sale could not at all purchase the mortgaged property for himself. The following cases might be mentioned as indicating that under the English law a mortgagee, who is given the power of sale cannot purchase the mortgaged property for himself :

(i) *Downes* v. *Grazebrook* (1),

(ii) *National Bank of Australia* v. *The United Hand-in-Hand and Bank of Hope Company* (2),

(1) (1817) 36 E.R. 77 at p. 80. (2) (1878-79) 4 A.C. 391.

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(iii) *Martinson* v. *Clowes* (1), and
(iv) *Hodson* v. *Deans* (2).

Section 215 of the Contract Act is as follows:

"215. If an agent deals on his own account in the business of the agency, without first obtaining the consent of his principal and acquainting him with all material circumstances which have come to his own knowledge on the subject, the principal may repudiate the transaction, if the case shows either that any material fact has been dishonestly concealed from him by the agent, or that the dealings of the agent have been disadvantageous to him."

There can be no doubt that section 215 of the Contract Act will apply only where the relationship of agent and principal exists, and not otherwise. It is contended that a mortgagee selling a mortgaged property under a power of sale can be said to be an agent of the mortgagor for the purpose of the sale of the mortgaged property. It is true, that the relationship of agent and principal might be inferred from the circumstances of the case. But the question is whether it can be properly said that the relationship of principal and agent has been constituted between the mortgagor and the mortgagee for the purpose of giving effect to the power of sale without the intervention of the Court. It seems not. The mortgagor obviously retains no control over the mortgagee after the mortgage deed with a power of sale is executed, and the mortgagor can issue no direction whatever to the mortgagee. The words "without first obtaining the consent of his principal and acquainting him with all material circumstances which have come to his knowledge on the subject" in section 215 of the Contract Act are inappropriate to the relationship of a mortgagor and mortgagee with a power of sale, because no consultation with the mortgagor is at all necessary to enable the mortgagee to effectively exercise his power

(1) (1882) 51 Ch.D. 857. (2) (1903) 2 Ch.D. 647.

of sale given in a mortgage deed. It will also be observed that the power of sale given under the mortgage deed cannot be exercised immediately after the execution and registration of the mortgage deed are effected, as the provisions of clause (*a*) or clause (*b*) of sub-section (*2*) of section 69 of the Transfer of Property Act will have to be complied with before the power of sale given in the mortgage deed can be exercised. Moreover, the power of sale, it must be remembered, is given, not for the benefit of the mortgagor or for the purpose of advancing the interest of the mortgagor, but it is more for the purpose of protecting the interest of the mortgagee, and whereas in the relationship of agency, it is primarily the interest of the principal which brings about the relationship of principal and agent.

The provisions of section 215 of the Contract Act do not therefore apply to the circumstances of this case, and as this section does not apply to the present case, it follows that section 202 of the Contract Act also does not apply in this case. It is difficult to see how the decision in the case of *Achutha Naidu* v. *Oakley Bowden & Co.* (1) can be usefully applied to the facts of this case. The relationship of principal and agent is in that case apparent and is indisputable, and it relates to a transaction entirely different from the present case.

It must therefore also be held that the provisions of section 69 of the Transfer of Property Act, read with section 215 or section 202 and any other section of the Contract Act, cannot be construed as permitting or authorizing the mortgagee to purchase the mortgaged property for himself at an auction sale. As the mortgage deed of the 8th April, 1932, does not purport to empower the mortgagee to purchase at the auction

(1) I.L.R. 45 Mad. 1005.

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sale of the mortgaged properties, it will not be necessary to decide in this case whether such power to purchase, if conferred, is valid in law.

The sale purported to be effected under the instrument dated the 9th November, 1940, is therefore void, and the appeal is allowed with costs, both in this appeal and the Original Side. The judgment and decree passed in the Civil Regular No. 58 of 1941 are accordingly set aside.