

IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[1993] SGCA 16

CA 135/1991

Between

Indian Overseas Bank

... Appellant

And

Motorcycle Industries (1973)
Pte Ltd
Another

... Respondent

GROUND OF DECISION

Credit and Security — Mortgage of real property — Mortgagee's rights

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**Indian Overseas Bank v Motorcycle Industries (1973) Pte Ltd
and Another**

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Karthigesu J; Rajendran S J; L P Thean J

01 March 1993

1 Cur Adv Vult

2 The second respondents, Abacus Realty Pte Ltd (`Abacus`), were, at the material time, the owners of the property known as Nos 27, 29, 31 and 33 Birch Road, Singapore (`the property`). By an instrument of mortgage dated 7 November 1978, Abacus mortgaged the property to the appellants, Indian Overseas Bank (`the bank`), to secure the payment by the first respondents, Motorcycle Industries (1973) Pte Ltd (`Motorcycle Industries`), and certain individuals named therein of the sum of \$4,629,770.84 with interest and costs under a judgment which the bank had obtained against Motorcycle Industries and the individuals. The property at that time was in the occupation of Abacus and/or Motorcycle Industries and was used as a motor showroom, sales office and store.

3 Subsequently, Motorcycle Industries and Abacus defaulted in their obligations under the mortgage and the bank in exercise of their power of sale put up the property for sale by public auction on or about 2 July 1981. With the agreement of Abacus, the property was offered for sale with vacant possession

and on 3 July 1981, vacant possession of the property was given to the bank, and the bank thereby became mortgagees in possession.

4 At the auction, the bank entered into a contract to sell the property to one Cheng Lai Geok (`Cheng`) at the price \$2.6m and pursuant to the terms of the contract Cheng issued a cheque for \$650,000, being the deposit representing 25% of the purchase price. However, the cheque was dishonoured and Cheng repudiated the contract stating that `he decided not to proceed with the purchase`. The bank issued a writ against Cheng on 7 October 1981 claiming specific performance and damages in lieu of or in addition to specific performance. Summons for directions was taken out in that suit in September 1982. Although an order was made on 15 October 1982 - slightly over a year from the commencement of the action - the action was not set down for trial until after a lapse of some four and a half years.

5 Throughout this period and subsequently, the bank continued to remain in possession of the property and did not let out the property. Abacus had been asking the bank for accounts and making enquiry whether the property had been rented out or put to profitable use. No satisfactory reply from the bank was forthcoming. The bank continued to allow the property to remain vacant and, apart from the action instituted against Cheng, did not take any step to terminate the contract made with Cheng and resell the property until April 1991.

6 On 13 September 1989, the respondents took out an originating summons against the bank seeking accounts to be taken and other consequential reliefs. The originating summons was subsequently amended to include a claim for the sale of the property by public auction pursuant to s 30 of the Conveyancing and Law of Property Act (Cap 61).

7 On 10 April 1991, the bank accepted the repudiation by Cheng of the contract made with him and entered into a fresh contract to sell the property to two new purchasers, namely, Lim Chor Pian and Lim Choo Kuan (`the Lims`), for the sum of \$2.33m and this sale was completed on 19 June 1991. The suit against Cheng eventually came on for hearing in June/July 1991 and judgment was given in favour of the bank. [See [1992] 2 SLR 38 .]

8 The originating summons against the bank came on for hearing subsequently before GP Selvam JC. At that time, as the property had been sold, the claim for the sale of the property was not pursued. The learned judicial commissioner at the conclusion of the hearing allowed the originating summons and made an order for necessary accounts to be taken and an order for payment by the bank to Abacus of such sums of rental income in respect of the property to be assessed by the registrar and that the rental should be credited to the computation of the amount of interest payable to the bank. [See [1992] 2 SLR 453 .] Against the decision of the learned judicial commissioner, this appeal has been brought.

9 Before us, several issues have been raised by Mr Peter for the bank in his detailed arguments but, in our opinion, they may be resolved into the following main issues:

- (a) whether Abacus as mortgagors were entitled to come to court to ask for necessary accounts without offering to redeem the property;
- (b) whether the bank as mortgagees in possession, in the circumstances of the case, had committed any breach of duty;
- (c) whether an order for an account in favour of Motorcycle Industries, not being the mortgagor, ought to have been made; and

(d) whether the claim for accounts was time-barred.

10 We propose to consider, first, the second issue which is really crucial in this appeal.

11 The duty of a mortgagee in possession was stated by Turner LJ in **Lord Kensington v Bouverie** [1855] 7 De GM & G 134[] 44 ER 53 at p 157:

... A mortgagee, when he enters into possession of the mortgaged estate, enters for the purpose of recovering both his principal and interest, and, the estate being, in the eye of this court, a security only for the money, the court requires him to be diligent in realizing the amount which is due, in order that he may restore the estate to the mortgagor, who, in the view of this court, is entitled to it.

12 The question is whether the bank had been diligent in realizing the amount which was due.

13 The bank took possession of the property on 3 July 1981 and on or about that date sold the property to Cheng with vacant possession. Cheng on 8 July 1981 or thereabout repudiated the contract and the bank appeared to have waited for about three months before they took out a writ against Cheng claiming specific performance and damages in lieu of or in addition to specific performance. Though a period of three months is not unusually or inordinately long, it is difficult to understand why the bank could not have acted promptly and swiftly upon the dishonour of the cheque for \$650,000 and repudiation of the contract by Cheng and have taken out the writ immediately within a matter of days against such defaulting purchaser. After the writ had been issued there followed a lapse of about one year before a summons for directions was taken out in respect of that action, and following that there was a further lapse of four and a half years before the action was set down for trial. Such procrastination

was inexplicable and prima facie the bank had not prosecuted the action with due diligence. That, however, was not really what Abacus complained about. They complained that during all this time the bank while retaining possession of the property had done nothing to put the property to any beneficial use. Since Cheng had repudiated the contract, there was no reason why the bank could not have accepted the repudiation, sold the property and sought to recover from Cheng any loss they would or might have suffered. The bank could have acted thus soon after Cheng had repudiated the contract or they could even have done so later, in 1982 or 1983. There was no evidence that during this period the property market was not favourable for the sale of such property. It must have been possible and practicable for the bank to have sold the property during this period. Alternatively, if they decided to keep the contract alive so as to enable them to obtain an order of specific performance in the action against Cheng, they should have known that litigation would be protracted and could have taken steps to let out the property. Again, it must have been possible and practicable to let out the property for a short term of three to five years. They appeared to have made no effort in terms of either putting up the property for resale or letting it out. They did nothing until 10 April 1991 when they terminated the contract with Cheng and entered into a fresh contract with the Lims. Between the date of sale to Cheng and the date of resale, there was a lapse of nearly ten years, and throughout the whole of this period the bank while retaining possession of the property had not put the property to any beneficial use. In our opinion, it is indefensible that the bank had not exercised any due diligence either in selling the property or letting it out. We cannot but agree entirely with the following finding made by the learned judicial commissioner.

... At the time the defendants [the bank] took possession of the property, it was in commercial use. I, therefore, infer and conclude that the property was tenantable when the defendants took possession and the purchaser repudiated the contract. The

defendants being only interested in recovering the moneys they had advanced, the prudent course for them was to accept the repudiation of the contract by the purchaser, resell the property, and recover the difference in price in case the resale price was lower. This the defendants did some ten years later. That was an inordinately long period to have the property vacant and continue to pay the property tax and a caretaker. The natural consequence of this was to increase the heavy financial burden the plaintiffs had been shouldering for that period. In addition, there can be no doubt that the disuse of the property over the period of ten years diminished the value of the property. The defendants did not produce any evidence before me to show that the property was untenable in 1981. Their only argument was that they were not under a duty to rent it out. This argument was wrong in law. There was unexplained inaction on their part. This is also reflected by the fact that only in 1991 did the defendants secure the documentation to evidence the discharge of the mortgage in favour of The Chartered Bank. I accordingly concluded that the defendants were in breach of their duty and that the plaintiffs suffered loss in consequence thereof. The loss must be ascertained before the registrar.

14 Having regard to what we have decided, the first issue which we have earlier set out can hardly arise. However, Mr Peter submitted at great length that the general or normal rule is that a mortgagor cannot bring an action against the mortgagee relating to the mortgage without expressly or by implication offering to redeem and that to this rule there are four exceptions and that the present case did not fall within any of the exceptions. We have no hesitation in rejecting this submission. The general rule and the exceptions to it have been stated in ***Fisher and Lightwood's Law of Mortgages*** (10th Ed) at pp 592-593 as follows:

As a general rule the mortgagor is not entitled to bring the mortgagee before the court except for the purpose of redemption. Hence a mortgagee cannot be made a party to an action relating to the mortgage unless there is expressly or by implication an offer to redeem.

15 This rule does not apply where the object of the proceedings is to obtain the construction of the mortgage deed, or where the equity of redemption has become subject to trusts which provide for the payment of the mortgage debt

and the mortgagee is made a party to an action relating to the trusts, and it does not apply where the mortgagor's claim is for sale and not redemption, or to restrain the mortgagee from an improper sale of the mortgaged property.

16 We accept that this is an established rule, but it is not of universal application and has been held inapplicable in various situations, and the exceptions enumerated in the above passage are by no means exhaustive. In **Jefferys v Dickson**, [1866] 1 Ch App 183 the mortgagor conveyed all his mortgaged property to the trustees upon trusts to pay certain annuities and the interest on the mortgages, and to accumulate the surplus rents and apply them in payment of principal, and subject to those trusts to hold the property for the mortgagors. The plaintiff, who was a subsequent encumbrancer, initiated proceedings against all the parties, seeking accounts to be taken under the deed creating the trusts. It was held that the general rule had no application to that case; that was the case that created one of the exceptions to the rule. Lord Cranworth LC, explaining the rationale for the rule said, at pp 188-189:

... A mortgagee is at law, and for many purposes in equity also, regarded as the owner of the mortgaged estate. The mortgagor has in equity a right to redeem the estate on paying to the mortgagee the principal and interest due to him, and for that purpose, but for that purpose only, to draw the mortgagee into litigation; for all other purposes he has parted with his whole estate to the mortgagee, and has no right to call in question the mode in which he may be dealing with that of which, except as to his liability to be redeemed, he is, as between himself and the mortgagor, the absolute owner.

17 Kekewich J in **Re Nobbs** [1896] 2 Ch 830 at p 833 explained the rationale for the rule thus:

... A decree for redemption is also a decree for foreclosure, and a mortgagor seeking to redeem can only do so subject to the penalty of being foreclosed if he does not redeem within the time limited; and therefore it is very important that the mortgagor

should not be allowed to come and harass the mortgagee without offering to redeem. The rule is for the protection of the mortgagee in view of the doctrine of courts of equity which confers on the mortgagor a power to redeem.

18 The learned judge there also did not apply the general rule as the matter before him was one involving construction of the mortgage deed. That case created another exception to the general rule.

19 It has been held that such a rule has no application where the mortgagor complains that the mortgagee is acting improperly: see **Murad v National Provincial Bank Ltd.** [1966] 198 The Estates Gazette 117 In that case, the bank which was a mortgagee applied to strike out the claim of the plaintiff, the mortgagor, as frivolous and vexatious on the ground that the mortgagor was suing the mortgagee without offering to redeem the mortgage. The application was refused by Pennycuik J. The relevant part of his judgment was reported as follows, at p 119:

*... Mr Browne [counsel for the bank] had contended that it was not open to a mortgagor to bring a mortgagee before the court without offering to redeem. That principle would be found stated in a great number of judicial authorities and textbooks - among them, 27 **Halsbury's Laws of England** (3rd Ed), in the chapter headed 'Proceedings for Redemption', in the passage at p 423; **Fisher and Lightwood's 'Law of Mortgages'** (7th Ed), under the chapter 'Redemption and Foreclosure' at p 688; **Hill v Kirkwood** 28 WR 358 at p 359; **Re Nobbs** [1896] 2 Ch 830 at p 833. It was not really in dispute that the principle stated in the passages to which he had referred existed and, with irrelevant exceptions, was applicable where the mortgagor sought relief against the mortgagee of some kind or the other but did not contend that the mortgagee was acting improperly. Mr Hames, however, said that the principle had no application where the mortgagor claimed that the mortgagee was acting improperly and sought to restrain that improper act; in particular, that was to say, said Mr Hames, where the mortgagor contended that the mortgagee was proposing to make an improper sale and sought to restrain that sale.*

20 On the face of it, it would be very strange if the principle did apply to such a case. A single example would illustrate this. Suppose there was a property worth o10,000 in mortgage to secure o8,000, and suppose that the mortgagee threatened to sell that property to his own wife at a price of o1,000. Was it really the law that in such a case the mortgagor could not apply to the court to restrain the sale without offering to redeem the mortgage and, indeed, bringing into court the whole sum of o8,000? He (his Lordship) was not concerned to decide this point, but if that was the law, it seemed to him to be something of a travesty of justice. No judicial authority had been cited in which it had been held one way or the other whether the principle on which Mr Browne relied applied in the circumstance now under consideration, namely, where the mortgagor was seeking to restrain what he contended was an improper exercise of the mortgagee`s power of sale.

21 A fortiori, this rule can have no application where, as in this case, the mortgagee has been shown to have committed a breach of duty. In the circumstances of this case, it is unarguable that Abacus were entitled to bring this action against the bank seeking, inter alia, an order for accounts to be taken.

22 We now turn to the third issue. Motorcycle Industries were not a mortgagor. The mortgage was a third party mortgage, ie a mortgage by Abacus, the owners of the property, to secure the liability of Motorcycle Industries and certain individuals named therein, the principal debtors. All of them were joined as parties to the instrument of mortgage and under the terms thereof, the obligations of Abacus and Motorcycle Industries (and the individuals) are joint and several. If the bank had not been in breach of duty they would have realized at least a substantial part of the moneys secured by the mortgage and such early realization would have resulted in a reduction of their liability to the bank.

Surely even as a judgment debtor, Motorcycle Industries are entitled, in the circumstances, to an account as to the extent of their liability to the bank.

23 In any case, the order as to the necessary accounts to be taken was made in favour of the appropriate parties. The order in so far as material is as follows:

(1) (1) an account of any and all sums disbursed or paid by the defendants [the bank] which are secured by the mortgage dated 7 November 1978 ('the mortgage') relating to the premises known as 27, 29, 31 and 33 Birch Road, Singapore ('the premises');

(2) an account of any and all sums received by the defendant from letting out the premises, or any other income received from the premises or which, but for the wilful default of the defendants, might have been so received;

(3) an account of the interests accrued and accruing on the moneys owing to the defendants from 27 March 1978 the date of the judgment ('the judgment') against the first plaintiffs [Motorcycle Industries] in Suit No 417 of 1978 to the date of this order;

(4) an account of all sums received by the defendants in reduction of the moneys that were owing to the defendants under the judgment and/or the mortgage;

(5) an account of any and all sums due from either the plaintiffs to the defendants or from the defendants to the plaintiffs, as the case may be, pursuant to the judgment and/or the mortgage;

(2) The defendants be liable to pay the second plaintiffs [Abacus] such sums of rental income to be assessed by the registrar in respect of the premises from 7 October 1981 and such rental should be credited monthly to the computation of the amount under para 1(3) hereof.

24 We see no merit in the complaint by the bank of this order. In our judgment, the order is correct.

25 Lastly, the appellant raised an argument that Abacus's claim for an account has been time-barred. We are unable to accept this argument. The remedy sought is the taking of accounts to ascertain the final amount. In the absence of a settled account there is a continuous cause of action until the bank as mortgagees ceased to be in possession. At the risk of repetition, we quote the following passage from 32 ***Halsbury's Laws of England*** (4th Ed) at p 455 (which was quoted by the learned judicial commissioner):

In the absence of special direction, the account taken against a mortgagee in possession is a continuous debtor and creditor account. The mortgagee is debited with all sums which he has received or which he is to be treated as having received by virtue of the mortgage, whether rents and profits, or accidental payments, such as proceeds of sale; and he is credited with the principal money, with interest accruing due from time to time, and with costs, charges and expenses, including all expenditure upon the mortgaged property which he is entitled to charge against it. The nature of the account requires that it is to be taken without limit, that is, from the commencement of the possession, or, if there has already been a settled account, from that account.

26 In the result, this appeal is dismissed with costs. There will be the usual consequential order for payment to the respondents to account of their costs of the amount deposited in court as security.

27 **Outcome:**

Karthigesu J
Rajendran S J
L P Thean J

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SGCA 16

BV Peter and Chia Kim Huat (Ramdas & Wong) for the appellants
Lim Chor Pee and Pauline Tan (Chor Pee & Co) for the respondents
