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RAUZIA ZAWEED MOHAMMED

v.

AUSTRALIA & NEW ZEALAND BANKING GROUP LIMITED

B

(SUPREME COURT—Kermode J.—2 August 1984.)

Civil Jurisdiction

C

(Mortgage—Default—mortgage entitled to exercise power of sale—can only be restrained if amount claimed were paid into court.)

S. M. Koya for the Plaintiff
B. C. Patel for the Defendant

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Plaintiff sought an interim injunction to restrain the defendant (Bank) from exercising its powers under Mortgage No. 18643 until final determination of the action.

Plaintiff and her husband were sole shareholders and directors of R. D. Mohammed (Furniture Trades) Limited (the Company).

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The Bank advanced money to the Company secured (inter alia) by a joint and several guarantee by plaintiff and her husband expressed to secure all moneys due from time to time by the Company to the Bank and a Mortgage No. 187312 given by plaintiff to the Bank over her freehold property in Certificate of Title No. 18643. The mortgage did not refer to any initial loan or advance by the Bank.

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On 28 February 1984 Solicitors for the Bank, by notice:

- (1) Demanded payment of \$63441 said to be owing as at 22 February 1984 by plaintiff to the Bank under the mortgage together with interest at the rate of 13½% p.a. from that date.
- (2) Stated that the Bank would exercise its power of sale under the said mortgage on her failure to comply with it.

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On 28 March 1984 plaintiff instituted this action by writ of summons dated and filed on that date. She applied ex parte for an interim injunction to restrain the Bank from exercising its powers of sale under Mortgage No. 18643 until the hearing of the action. This was granted, then extended to 1 June 1984, then sought again on or about 2 August 1984.

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In her Statement of Claim plaintiff asked for a declaration that she had been discharged from her obligation under the Mortgage and guarantee.

The plaintiff did not allege in the affidavit that the Bank was not entitled to demand payment by her of the moneys secured by the Mortgage, nor that it was invalid. A

The Mortgage was stamped for a duty of 50c; and the Debenture for \$150—appropriate for securing \$25000.

The plaintiff alleged in her affidavit that the Bank gave the company advances beyond an initial loan of \$25000 without her consent. She referred to Indemnity Guarantee and Bailment Act which the Court said would, if the section applied, discharge her from liability for any sum in excess of \$25000. B

The plaintiff proposed to pay into Court \$25000 if an injunction were granted.

Held: The Bank, if moneys were owed, had a statutory power of sale (Property Law Act S. 79) where the plaintiff had made default in payment of moneys secured by it. C

The Court will not ordinarily interfere to restrain a mortgagee from exercising its powers of sale. (“unless there is something very stong”). D

It does not interfere without requiring the plaintiff applying to pay into Court the amount being claimed by the Mortgagee. (*Macleod v. Jones* (1883) 24 Ch. 289 per Cotton L.J. at p.299; *Inglis & Another v. Commonwealth Trading Bank of Australia* 126 C.L.R. 161.

Authorities concerned with the principle to be followed when considering whether an injunction should be granted do not allow the above well established rule to be ignored. E

Matters of discretion considered included that the Bank’s security was being reduced by the daily accrual of interest. (*American Cyanamid Co. v. Ethicon Co. Ltd.* (1975) A.C. 396. F

Any award of damages if due would be an adequate remedy. The Bank would be able to meet any award that might be made.

However, the Court would not interfere with the Bank’s exercise of its statutory power to sell under the mortgage.

Application dismissed. G

Cases Referred To:

MacLeod v. Jones (1883) 24 Ch. 289.

Inglis & Another v. Commonwealth Trading Bank of Australia (1971–1972) 126 C.L.R. 161.

American Cyanamid Co. v. Ethicon Ltd. (1975), A.C. 396. H

KERMODE, Mr Justice.

Judgment

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The plaintiff is the registered proprietor of the property described in Certificate of Title No. 18643.

She and her husband Mr Deedar Mohammed are the shareholders and directors of the duly registered Company R. D. Mohammed (Furniture Trades) Limited (the said company).

B

The defendant Bank (the Bank) advanced money to the said company which was secured by (inter alia) a joint and several guarantee executed by the plaintiff and her husband in favour of the Bank and a mortgage No. 187312 given by the plaintiff to the Bank over her said freehold property.

On the 16th day of September, 1983, a receiving order was made against the said company upon a petition presented by a creditor, Timber and Building Supplies (Fiji) Limited.

C

On the 13th day of July, 1983, the Bank in exercise of its powers under a debenture given by the said company over its assets appointed two Receivers.

On the 5th day of January, 1984, the creditors of the company appointed the Official Receiver the said company's liquidator.

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By notice dated 28th February, 1984, Messrs. Wm. Scott & Co. solicitors for the Bank demanded payment of the sum of \$63,441 alleged to be owing by the plaintiff to the Bank under the said mortgage as at the 22nd day of February 1984 together with interest at the rate of 13½ per centum per annum from that date.

The notice further notified the plaintiff that the Bank would exercise its powers of sale under the said mortgage on her failure to comply with the terms of the notice.

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The plaintiff instituted this action by writ of summons dated and filed on the 26th March, 1984, and contemporaneously therewith applied ex parte for an interim injunction to restrain the Bank from exercising its powers of sale under the said mortgage No. 18643.

The interim injunction was granted only for a period of 8 days to permit the plaintiff to seek a further injunction by summons to be served on the Bank.

F

The interim injunction first granted was extended on three occasions up to the 1st June, 1984, but was not extended after that date.

The application before me now is for an injunction on similar terms to that granted on the 26th March, 1984, until final determination of this action.

A number of affidavits have been filed and counsel for both parties have made written submissions.

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It is not disputed by the plaintiff that the sum of \$63,441 was owing by said company to the Bank on the 22nd February, 1984. She does not allege in her affidavit filed in support of her application that the Bank is not entitled to make demand on her for payment of the moneys secured by mortgage No. 18643 although in her statement of claim she claims a declaration that she has been discharged from her

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obligations under the mortgage and the guarantee.

She seeks in her claims a number of orders (all except one being in the alternative) and the declaration earlier referred to.

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I am not concerned at this stage with the relief she claims in this action.

I have before me copies of the guarantee and the mortgage executed by the plaintiff but am only concerned with the mortgage.

The mortgage No. 187312 is on the standard third party mortgage form used by the Bank. It purports to secure all moneys due from time to time by the said company to the Bank. It does not specify therein the amount of the initial loan or advance made to the said company.

B

It is not in dispute that the mortgage is a valid mortgage but Mr Koya argues that it is only stamped to secure an indebtedness of \$25,000 and the plaintiff is prepared to pay that sum into Court if an injunction is granted.

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The Copy of the mortgage annexed to the plaintiff's affidavit is stamped with collateral stamp duty of fifty cents.

The principal document, the debenture given by the said company, has an illegible impression of an impressed stamp and figures \$125-00 on it. \$125.00 is the stamp duty on a mortgage securing the sum of \$25,000.

The plaintiff did not in her affidavit refer to the issue of stamping and Mr B. R. Stacy the Relieving Chief Manager of the Bank in his affidavit in reply had no occasion to refer to stamping.

D

On the document before me the mortgage is certainly valid to secure the sum of \$25,000. The debenture may have been upstamped to secure the sum the Bank now claims but if it is not it is an omission that can be remedied at any time merely by having the debenture upstamped by the Commissioner of Stamp Duties and paying any fine that he may levy for late stamping.

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I have to accept for the purposes of this application that the mortgage is valid and that a proper demand has been made for payment of moneys alleged to be owing thereunder.

The Bank alleges that the plaintiff is indebted to it pursuant to the provisions of the said mortgage. The plaintiff in her statement of claim seeks a declaration that she has been discharged from her obligation under the said mortgage. In her affidavit in support of this application she does not state any facts which would indicate that she is not indebted to the Bank. She does, however, allege that the Bank gave the said company advances beyond the initial loan of \$25,000 without her consent and refers to section 11 of the Indemnity Guarantee and Bailment Act which if the section applied would discharge her from liability for any sum in excess of the \$25,000.

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The Bank if any moneys are owing under the mortgage has a statutory power of sale by virtue of section 79 of the Property Law Act where the plaintiff has made default in payment of the moneys secured under a mortgage.

The law is quite clear. Halsbury 4th Edition Volume 32 paragraph 725 states:

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"The mortgage will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has begun a redemption

A action, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount claimed into court, that is, the amount he claims to be due to him”.

Halsbury refers to very old cases in support of the statements quoted. Mr Patel has referred to a number of later cases where a Court has declined to interfere with a mortgagee's powers of sale under a mortgage.

Cotton L.J. in *McLeod v. Jones* (1883) 24 Ch. 289 at p. 299 said:

B “This is an application to restrain a mortgagee from exercising his power of sale. Now under ordinary circumstances the Court never interferes unless there is something very strong; it does not interfere on any suggested case without requiring the Plaintiff applying to pay into Court not what the Judge or the Court on hearing the evidence is satisfied will probably be the amount due, but what the mortgagee, the accounts not having been yet taken, swears is due to him on his security. And that is perfectly right, because we ought not to prevent mortgagees from exercising the powers given to them by their security without seeing that they are perfectly safe.”

C In 1972 in the case of *Inglis & Another v. Commonwealth Trading Bank of Australia* 126 C.L.R. 161 the High Court of Australia in a very short judgment delivered by Barwick C.J. dismissed an appeal from Walsh J's decision dismissing an application for an interim injunction seeking to restrain a mortgagee exercising powers conferred by a mortgage. The learned Chief Justice said:

D “I have not heard anything, nor been referred to any authority, which causes me in the least to doubt the correctness of the refusal of Walsh J. to grant the interlocutory injunction sought by the appellant or the reasons which he gave for that refusal. I find no need to discuss the arguments offered, and the authorities referred to, by the appellant. Such of them as were relevant are sufficiently answered in his Honour's reasons.

E The case falls fairly, in my opinion, within the general rule applicable when it is sought to restrain the exercise by a mortgagee of his rights under the mortgage instrument. Failing payment into court of the amount sworn by the mortgagee as due and owing under the mortgage, no restraint should be placed by order upon the exercise of the respondent mortgagee's rights under the mortgage.”

F Mr Koya argues that the granting of an interlocutory (interim) injunction is still governed by equitable principles. There is no doubt that in an appropriate case the Court is empowered to restrain a mortgagee exercising power of sale. Mr Koya relies on the case of *American Cyanamid Co. v. Ethicon Ltd.* 1975, A.C. 396 and has put forward several propositions supported by a number of authorities.

G Those authorities support certain principles which are followed when considering whether an injunction should be granted. They are not however authorities which would authorise me to ignore the long line of authorities and what must now be taken to be a well established rule that a Court will not except in an exceptional case restrain a mortgagee from exercising power of sale conferred on him under a mortgage unless the mortgagor offers to pay all moneys claimed by the mortgagee into Court. The plaintiff has offered only to pay in \$25,000.

H If I had to consider the principles enunciated in the *Cyanamid* case I would consider on the balance of convenience that damages would be an adequate remedy to

the plaintiff. On the other hand there is a large sum alleged to be owing to the Bank on which interest at the rate of 13½% per annum is being charged. The Bank's security is being reduced by the daily accrual of interest to the principal sum. The longer the delay in disposing of the action the greater the debt would be if an injunction was granted. A

The mortgagee is a well established Bank and it can be assumed that it will be better able to meet any award of damages that may be made than the plaintiff.

I do not consider however, I can or should interfere with the Bank's exercise of powers conferred on it by the said mortgage. It has a statutory power to sell under the mortgage and this case is in any event a case where an interim injunction would not be granted because in my view damages would be an adequate remedy if the plaintiff were to succeed on any of her claims against the Bank. B

The application is dismissed with costs to the Bank.

Application dismissed. C

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