

STATE OF KERALA

v,

COCHIN CHEMICAL REFINERIES LTD.

March 26, 1968

[J. C. SHAH, V. RAMASWAMI AND G. K. MITTER, JJ.]

Contract—Mortgage deed providing for loan to company and for supply of goods by company to mortgagee—Sale price to be adjusted against loan and interest—Mortgagee not advancing loan—If relieved of obligation to purchase goods—Whether liable for damages for not advancing loan and for breach of contract to buy goods.

A mortgage deed was executed by the respondent company and one of its directors in favour of the State of Kerala. It was provided *inter alia* by the terms of the deed that in consideration of the State granting a loan of a sum of Rs. 2.5 lakhs to the company, the latter would supply to the State 3,000 tons of ground-nut cake within a specified period and make deliveries in accordance with instructions to be given by the State, and the account for this supply will be adjusted against the loan amount and the interest thereon. It was common ground however that the loan amount, though acknowledged in the mortgage deed as received by the company, was never in fact advanced by the State. The respondent company arranged for the supply of goods as agreed and sought the necessary instructions for delivery, but these were never given.

The company instituted a suit in March 1953 against the appellant State for damages for failure to advance the loan amount and for breach of contract to purchase the ground-nut cake. The trial court decreed the suit for Rs. 36,000 being damages for failure to advance the loan and for Rs. 1,23,000 as damages for breach of contract. An appeal to the High Court challenging the liability of the State to compensate the company for failure to take delivery of the goods was dismissed.

It was contended on behalf of the State that the obligation to take delivery of the goods agreed to be purchased was contingent upon the Government's advancing the loan amount, so long as the amount was not advanced by the State, the mortgage was not in law effective and the Company could not enforce the contract relating to ground-nut cake agreed to be purchased by the State.

HELD : Dismissing the appeal.

A transaction of mortgage formally executed does not become void or ineffective merely because the mortgagee fails to advance the amount of money undertaken to be advanced by him. Under the terms of the mortgage deed liability of the State to purchase the groundnut cake from the Company was not made conditional upon the State advancing the loan. By failing to advance the loan amount the State could not avoid liability to carry out the obligation to purchase the goods contracted to be purchased. Even if it be assumed that the indenture incorporated reciprocal promises, in the absence of any express provision to that effect the contract could not be terminated by the default of the State. Breach of contract by one party does not automatically terminate the obligation under the contract: the injured party has the option either to treat the contract as still in existence, or to regard himself as discharged. If he accepts the discharge of the contract by the other party, the contract is

- A at an end. If he does not accept the discharge, he may insist on performance. [560 C-D; 561 D].

Tatia v. Babaji, I.L.R. 22 Bom. 176, *Rashik Lal v. Ram Narain and Others*, I.L.R. 34 All. 273, *Dip Narain Singh v. Nageshar Prasad and Others*, I.L.R. 52 All. 338, *White and Carter (Councils) Ltd. v. McGregor*, [1962] A.C. 413. referred to.

- B There was no substance in the contention that the State was by its default liable to compensate the Company only for loss arising out of its failure to advance the money, and not out of its failure to purchase the goods. The State's undertakings to advance the loan and to take delivery of ground-nut cake were two independent, though inter-related transactions; and by committing a breach of its own obligation to advance the loan, the State did not absolve itself from liability for the breach arising from its refusal to take delivery of the goods offered. [561 F-H].

- C **CIVIL APPELLATE JURISDICTION :** Civil Appeal No. 741 of 1965.

Appeal by special leave from the judgment and decree dated April 1, 1963 of the Kerala High Court in Appeal Suit No. 480 of 1958.

- D *Sarjoo Prasad* and *M. R. K. Pillai*, for the appellant.
S. V. Gupte and *A. G. Pudissery*, for the respondent.

The Judgment of the Court was delivered by

- E **Shah, J.** On October 9, 1950, a deed styled an "indenture of mortgage" was executed by the Cochin Chemicals and Refineries Ltd.,—hereinafter called 'the Company' and N. C. John a Director of the Company, in favour of the State of Travancore-Cochin. The relevant terms of the indenture were :

- F "In consideration of the sum of Rupees 2.5 lakhs (2,50,000) borrowed by the mortgagor No. 1 from the mortgagee (the receipt of which sum mortgagor No. 1 doth hereby admit and acknowledge) mortgagor No. 1 hereby covenants with the mortgagee as follows :—

- G (a) That the mortgagor No. 1 shall supply to the mortgagee 3,000 tons of groundnut cake at the rate of 600 tons per month within a period of five months commencing with the first day of November 1950 and ending with the last day of March 1951.

- H (b) That the account for the groundnut cakes supplied by mortgagor No. 1 to the mortgagee will be settled and adjusted against the loan amount of Rs. 2.5 lakhs and interest thereon at 4½% per annum at the end of March 1951, the groundnut cakes supplied being valued at the average price fixed by the Government during the period for purchases from other sources. If on such adjustment any amount is found due to the mortgagor No. 1 the same will be paid by the mortgagee. If how-

ever it is found that the price of the groundnut cakes supplied is not sufficient to make up the loan amount with the interest thereon, mortgagor No. 1 shall pay the deficit amount to the mortgagee immediately after the settlement of account.

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(c) That mortgagor No. 1 shall deliver the groundnut cakes at any depot in the Travancore-Cochin State as may from time to time be required by the Director of Agriculture from the mortgagee free of transport charges."

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II. "For the consideration aforesaid the mortgagor No. 1 hereby transfers by way of simple mortgage to the mortgagee" all the assets described in Sch. I, "and mortgagor No. 2 hereby transfers by way of simple mortgage to the mortgagee" the assets described in Sch. II, "to the intent that the said premises shall remain and be charged as security for the payment to the mortgagee of the said principal money, interest and costs in accordance with the Covenants hereinbefore contained."

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III. "The mortgagors hereby covenant with the mortgagee as follows :—

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The indenture was executed by the Company and N. C. John and also by the Secretary to the Government of Travancore-Cochin on behalf of His Highness the Rajpramukh. A supplementary deed was executed on November 7, 1950, whereby it was agreed that without prejudice to the right to recover the amount secured or any portion thereof as stipulated, it shall also be recoverable under the Revenue Recovery Act for the time being in force or in other manner as the mortgagee may deem fit.

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It is common ground that the amount acknowledged in the indenture was not advanced at the date of the indenture and was never advanced thereafter. The Company arranged for the supply of goods agreed to be sold under the terms of paragraph I(a) and wrote from time to time letters to the appropriate officers of the State asking them to give instructions about the depots where the supplies were to be made. In reply to the letter Ext. H, the Assistant Director of Agriculture by Ext. M, dated January 3, 1951, replied that :

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"I write to invite your attention to my letter of even No. dated 12-12-1950 and to inform you that I shall be placing orders for the supply of groundnut cake as soon as I get orders from Government providing the necessary funds for paying you the advance of Rs. 2½ lakhs."

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A No instructions for supply were however given to the Company to supply the goods agreed to be purchased by the State. The Company instituted on March 9, 1953, an action against the State of Travancore-Cochin for a decree for Rs. 3,600/- being damages for failure to advance the loan of Rs. 2,50,000/-, and Rs. 1,68,600/- as damages for breach of contract to purchase 3,000 tons of groundnut cake under the indenture. The Trial Court decreed the suit for Rs. 3,600/- being damages for failure to advance the loan, and for Rs. 1,23,000/- being damages for breach of contract to purchase groundnut cake. In appeal to the High Court, the liability of the State to compensate the Company for failure to take delivery of the goods offered to be delivered alone was challenged. The High Court confirmed the decree passed by the Trial Court negating the contention raised on behalf of the State that the obligation to take delivery of the goods agreed to be purchased was contingent on the Government's advancing Rs. 2,50,000/-. The State has appealed to this Court with special leave.

D Two questions arise for determination in this appeal :

(1) Whether under the terms of the indenture the State by refusing to advance the loan of Rs. 2,50,000/- was absolved from the obligation to purchase the goods referred to in paragraph I(a) of the indenture; and

E (2) Whether in the circumstances of the case, the Company was not entitled to claim damages for breach by the State to purchase the goods agreed to be purchased.

F The indenture incorporated two transactions: (1) a mortgage in favour of the State by the Company and N. C. John charging properties belonging to the two mortgagors for repayment of Rs. 2,50,000/-; and (2) the Company agreeing to sell and the State agreeing to purchase 3,000 tons of groundnut cake at the rate of 600 tons per month for five months to be supplied at any of the depots in the Travancore-Cochin State as may from time to time be designated by the Director of Agriculture. The indenture expressly recited that the amount of Rs. 2,50,000/- was advanced to the Company but the supplementary deed dated November 7, 1950, and the correspondence make it clear that though the money was recited to have been actually advanced, it was not in fact advanced, but it was intended by the State Government to advance it. For some reason, which it is difficult to ascertain from the record, the State Government did not carry out its obligation to advance the money, after obtaining the indenture and the supplementary deed from the Company and its Director. But even as late as January 3, 1951, as is clear from Ext. M—the Assistant Director of Agriculture reiterated the promise that the money

will be advanced and delivery of goods offered by the Company will be accepted. A

Counsel for the State contended that so long as the loan was not advanced by the State, the mortgage was not in law effective, and the Company could not enforce the contract relating to groundnut cake agreed to be purchased by the State, for the obligation undertaken was in consideration of the loan of Rs. 2,50,000/- and arose only when the loan was advanced. But the assumption, that if the State did not advance the loan which it had undertaken to advance, the indenture was ineffective, cannot be accepted. There is no such express term in the deed, and none can be implied from the covenants and the surrounding circumstances. A transaction of mortgage formally executed does not become void or ineffective merely because the mortgagee fails to advance the amount of money undertaken to be advanced by him. If without advancing the amount agreed to be advanced, he sues on the title created under the deed of mortgage, the Court will not award him a decree for anything more than what he has advanced. But that is not to say that the mortgage is invalid. In *Tatia v. Babaji*⁽¹⁾, Farran, C.J., observed :

"I am not, however, . . . prepared to assent to the train of thought which puts conveyances of lands in the *mofussil* perfected by possession or registration where the consideration expressed in the conveyance to have been paid has not in fact been paid in the same category as contracts void for want of consideration." B
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Similar observations were made in *Rashik Lal v. Ram Narain and others*⁽²⁾, where Karamat Hussain, J., observed at p. 276 :

"..... mortgage under the Transfer of Property Act is a transfer of an interest in the land mortgaged, and not a mere contract. It therefore follows that no sooner a valid mortgage deed is registered, an interest in the property mortgaged, in the absence of any contract to the contrary, vests in the mortgagee notwithstanding the fact that the mortgage money has not been paid by the mortgagee to the mortgagor. The mere non-payment of the mortgage money cannot have the effect of rendering the mortgage invalid." F
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Sulaiman, J., in *Dip Narain Singh v. Nageshar Prasad and others*⁽³⁾ observed that once a document transferring immovable property has been registered, the transaction passes out of the domain of a mere contract and into one of a conveyance. Such a completed transaction is governed by the provisions of the H

(1) I.L.R. 22 Bom. 176.

(2) I.L.R. 34 All. 273.

(3) I.L.R. 52 All. 338.

- A** Transfer of Property Act and so much of the Contract Act as is applicable thereto.

- The argument that because the amount was not advanced by the State to the Company, the mortgage was void or ineffective therefore cannot be accepted. Nor do the terms of the indenture justify the plea that the liability of the State to purchase 3,000 tons of groundnut cake from the Company was conditional upon the State advancing Rs. 2,50,000/-. The two transactions incorporated in the indenture were undoubtedly inter-related. The price payable for the supplies of groundnut was to be adjusted towards the amount advanced or to be advanced by the State. But by failing to advance the amount the State could not avoid liability to carry out the obligation to purchase the goods contracted to be purchased. Even if it be assumed that the indenture incorporated reciprocal promises—the State to advance Rs. 2,50,000/- and the Company to deliver 3,000 tons of groundnut cake—in the absence of any express provision to that effect the contract could not be terminated by the default of the State. Breach of contract by one party does not automatically terminate the obligation under the contract: the injured party has the option either to treat the contract as still in existence, or to regard himself as discharged. If he accepts the discharge of the contract by the other party, the contract is at an end. If he does not accept the discharge, he may insist on performance: see the judgment of the House of Lords *White and Carter (Councils) Ltd. v. McGregor*⁽¹⁾. The case before the House was a Scottish case, but the law of Scotland is not different on the matter under consideration from the English law, and the Indian Contract Act closely follows the English Common Law in that matter. It cannot, therefore, be said that by refusing to advance the loan which the State had undertaken to advance, the obligation to purchase groundnut cake from the Company came to an end.

- Nor is there any substance in the second contention that the State was by its default liable to compensate the Company only for loss arising out of its failure to advance the money, and not out of its failure to purchase the goods. The State had undertaken to advance Rs. 2,50,000/- to the Company. It had also undertaken to take delivery of 3,000 tons of groundnut cake offered by the Company under the terms of contract of sale. These were two independent, though inter-related transactions, and by committing a breach of its own obligation to advance the sum of Rs. 2,50,000/- the State did not absolve itself from liability for the breach arising from the refusal to take delivery of the goods offered. The cause of action arising out of the refusal to take delivery of the goods offered was independent of the cause of action arising out of the

(1) [1962] A.C. 413 = [1961] 3 All. E.R. 1178.

breach committed by the State in not advancing the loan. The two causes of action were cumulative and not alternative. There is therefore no warrant for the plea that by claiming damages for loss suffered by it as a result of the failure to advance the loan, the Company elected to give up its claim for damages for breach of the contract to take delivery of 3,000 tons of groundnut cake by the State.

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The appeal fails and is dismissed with costs.

R.K.P.S.

Appeal dismissed.