

IN THE COURT OF APPEAL OF SEYCHELLES

CIVIL APPEAL NO. 9 OF 1987

ANGLO WELSH INVESTMENT LIMITED
(IN RECEIVERSHIP).....APPELLANT

versus

BANQUE FRANCAISE COMMERCIALE
OCEAN INDIEN.....RESPONDENT

Mr. Georges - for Appellant

Mr. Shah - for Respondent

JUDGMENT OF MUSTANA, P.

The facts giving rise to this appeal are as follows. The respondent bank had lent certain sums of money to the appellant company, and in so far as this appeal is concerned, the sums lent were secured by the appellant executing three separate charges, all over a piece of land owned by the appellant, being Parcel H743 at Mare Anglaise, and on which the appellant had erected a number of luxury flats, known as "Yacoo Village". The debt carried stipulated interest rates which varied from time to time, ranging from 14% p.a. to 20% p.a.

On 13th August, 1984, the Republic of Seychelles compulsorily acquired the land Parcel H743 under the provisions of the Land Acquisition Act 1977 (hereafter called the Act). In terms of section 11 of the Act the interest of every party in the acquired land was converted into a right of compensation from the Republic. In accordance with the Act the respondent submitted its claim for compensation as a mortgagee or chargee, and claimed the sum of Rs. 629, 709.20. which represented principal and interest as at the date of acquisition. Similarly the appellant claimed Rs. 2 million as compensation. Both the sums were accepted by the Republic. By agreement between the appellant and the Republic the Republic was to pay the appellant the 2 million rupees by quarterly instalments of the capital sum plus interest at 4% p.a., which rate of interest was subsequently increased to 8% p.a. As on 22 January, 1987 four such quarterly payments had been made to the appellant by the Republic.

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In May, 1986 the appellant filed an action in the Supreme Court praying for a declaration that its liability to the respondent under the charges over Parcel H743 had been extinguished and discharged by the compulsory acquisition of the said land by the Republic, that the appellant was only liable to repay the respondent the sum of Rs.629,709.20 in full satisfaction of its indebtedness, and that the appellant was not liable to pay any interest or other charges accrued due after the said date of acquisition. To make the matter clear, the respondent had not been paid back the full sum of Rs.629,709.20, and the appellant was still in debt to the respondent at the date the appellant filed the declaratory suit.

The appellant relied on the provisions of Section 31(5) of the Act for its proposition. The section reads:

"(5) Where a mortgagee claims compensation under this Act the acquisition of the land, shall, to the extent to which the compensation payable to the mortgagee under Section 31(1) is sufficient to satisfy the mortgage debt and interest costs and charges due to the mortgagee, as at the date of acquisition, be deemed to have had the effect of extinguishing the liability of the mortgagor under the mortgage as from the date of acquisition".

The respondent conceded that the sum agreed as compensation was sufficient to satisfy the sum owed by the appellant as at the date of acquisition, but contended that the appellant remained liable to pay interest on any sum due and owing at the agreed rate of interest as charged by the respondent. At the date of the declaratory suit the interest payable was 20% p.a.

In fact the whole issue revolves around the point whether the appellant was liable to pay the agreed rate of interest to the respondent from the date of acquisition until final settlement of its debt. The appellant had contended that the acquisition of the land by the Republic had operated to crystallize or freeze the debt it owed the respondent as at the date of acquisition. The cut-off date, as it were, was 13th August, 1984, from which date the appellant claimed that its indebtedness to the respondent was extinguished, and apart from

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its liability to pay the respondent the fixed sum of Rs.629,709.20, it was not liable in respect of any interest or charges for any sums due or owing to the respondent.

The declaratory suit came before Seaton, C.J. The learned Chief Justice referred to French Jurisprudence in construing the provisions of the Act. He referred to certain passages in Dalloz Repertoire Pratique under the title "Privileges et Hypothèques" and to comments of Dalloz on the relationship between a mortgage and a debt. He cited inter alia notes 634, and 640

"634. L'hypothèque est un droit accessoire. Elle est donc entachée des mêmes vices que l'obligation principale et disparaît avec elle.....

640 L'indivisibilité de l'hypothèque est sans influence sur la nature de l'obligation qu'elle garantit, l'accessoire ne pouvant re'agir sur le principal"

The learned Chief Justice was satisfied that the debt controls the mortgage, not the reverse, and that a contract for a mortgage consists of two parts (1) the security (l'hypothèque) and (2) the loan (la créance). The Chief Justice said:

"If the loan is discharged in full then the security can be extinguished, when the loan is partially repaid, the security remains on the amount to which the loan has been reduced".

He held that on the acquisition by the Republic of the land in this case, the security had been extinguished. The debt also would have been extinguished, had it been repaid in full from the compensation, but it was not yet fully repaid. He held that the respondent was therefore entitled to demand the agreed rate of interest on the sum still due and owing. The learned Chief Justice refused to grant the declaration prayed for by the appellant. From that refusal the appellant has appealed to this Court.

Before us Mr. Georges for the appellant submitted that since the compensation payable by the Republic was sufficient to satisfy the mortgage debt owed to the respondent by the appellant the liability of the mortgagor, i.e. the appellant, was extinguished on the date of acquisition, by virtue of the provisions of Section 31 (5). Mr. Georges contended that the words "extinguishing the liability

of the mortgagor under the mortgage" must mean the full discharge of the liability of the mortgagor from the debt and that the debt itself would also be extinguished as at the date of acquisition. In support of this contention Mr. Georges relied on Section 32(a) of the Act which reads:

"32 - Where an amount has been paid to or recovered by a mortgagee under a mortgage in respect of a liability which upon the making of a claim by a mortgagee is deemed to have been discharged as from the date of acquisition by virtue of Section 31(5) -

(a) the mortgagee is liable to repay that amount to the person who paid it....."

Mr. Georges submitted that Section 32(a) would indicate that the mortgagee is only entitled to the sum claimed as due on the acquisition date, and nothing would be due after that date, as any sum paid in excess of such a claim is repayable by the mortgagee. He also referred to Section 39 which reads:

"39 - where land which is subject to a mortgage is compulsorily acquired under this Act and the whole part of the mortgage debt is not discharged by virtue of this Act, the mortgagee retains, in respect of the whole or that part of the mortgage debt, as the case may be, his rights and remedies against the mortgagor (other than rights and remedies in relation to the land acquired) and in relation to any other land which is subject to the mortgage".

Mr. Georges contended that the express retention of the mortgagee's right against the mortgagor for any unpaid sum would be otiose if the mortgagee was in any event entitled to such right.

Mr. Shah for the respondent submitted that under the Act, when the Republic compulsorily acquired land, the land acquired would be free from all interest obligations, charges and other encumbrances - Section 10(2). In terms of Section 31(2) a mortgagee can make a claim for compensation for the principal and interest due under the mortgage as at the date of acquisition. If the compensation payable is sufficient to cover such an amount, then the liability of the mortgagor under the mortgage is discharged, i.e. the liability of the mortgagor to provide security for the debt is extinguished. If however the debt is not repaid or not repaid in full, the original obligations between the lender and the borrower continue, and the debtor continues to remain liable for the sum due and owing until full payment, even after the date of acquisition. The Republic, on acquisition, obtains a clear title free from

encumbrances, whether the debt due to a mortgagee by a mortgagor is paid in full or not. In support Mr. Shah relied on Section 37 which reads:

"37 - Upon payment or tender of compensation to the mortgagee, he shall, if so required by the mortgagor, and at the expense of the mortgagor, execute a discharge of the mortgage debt to the extent to which the mortgage debt is discharged by virtue of section 31(5)."

Mr. Shah's point was that the words "to the extent to which the mortgage debt is discharged" would indicate that even if the full mortgage debt is not paid the land acquired would vest in the Republic free of encumbrances as at the date of acquisition.

I will now attempt to construe the relevant sections of the Act. Section 31(5) speaks of "mortgage debt". I think, the term in this appeal, means the debt owed and secured by the mortgage over Parcel H743. Once the mortgage is discharged, i.e. the land Parcel H743 is released from the mortgage, but the debt due is not or not fully repaid at such discharge, then the debt remaining still due and owing will no longer be a mortgage debt but becomes a simple debt. I now turn in particular to the words in Section 31(5)

"be deemed to have had the effect of extinguishing the liability of the mortgagor under the mortgage as from the date of acquisition".

In my view, under the general law of mortgage in England, and, as appears from the learned Chief Justice's citations from Dalloz, and in France, leading inevitably to the inference that it would be the same in Seychelles, the liability of a mortgagor under a mortgage is, that in the event the debt secured is not paid, the property mortgaged as security for the debt is liable to be sold to meet such payment. In terms of section 31(5) if the compensation payable is sufficient to satisfy the mortgage debt as at the date of acquisition, the mortgagor is forthwith discharged from liability under the mortgage. The liability under the mortgage is the liability to sell the land mortgaged to repay the borrowed sum, if necessary. In my view this means that only the mortgage debt, i.e. the debt as secured by the

mortgage and for which the mortgagor is liable under the mortgage, is discharged. In this case if payment of Rs.629,709.20 had been made to the respondent at the date of acquisition, the debt also could have been extinguished. But if the debt was not or not fully repaid, then the liability of the mortgagor under the mortgage was deemed discharged, because the Republic took the acquired land free from encumbrances. However the debtor would remain liable for the unpaid part of the debt. The remaining debt would no longer be a mortgage debt but becomes a simple debt, unsecured and would rank pari passu with other unsecured creditors. And this simple debt would carry interest at the agreed rates as contained in the original loan agreement entered into between the parties.

Section 32 refers to a mortgage debt, and I think the provisions therein merely make provision for a refund of any double payment towards such mortgage debt.

In my view the provisions of Section 39 provide that if the compensation claim by a mortgagee is not made or if the compensation is insufficient to discharge the mortgage debt as at the date of acquisition, the mortgagee would retain his rights against the mortgagor in all other respects, including the right over any other land subject to the mortgage, but that the charge over the land acquired would be extinguished. A piece of land acquired under the Act would be free of encumbrances in any circumstance. In this connection the provisions of Section 31(6) and (7) would seem relevant.

"31(6) A mortgagee who waives his rights to compensation is absolutely debarred from claiming or recovering as mortgagee any compensation or other amount from the Republic.

(7) Waiver of his rights to compensation by a mortgagee or failure by a mortgagee to claim compensation, does not affect his rights and remedies against the mortgagor or in respect of land included in the mortgage other than the land acquired."

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Mr. Georges observed that it would bear harshly on the appellant if it had to pay a high rate of interest to the respondent when the Republic is currently paying the appellant at the rate of 8% p.a. on the balance of the unpaid claim. That is true, but the appellant was the borrower and had agreed to pay the rates of interest charged, and cannot now escape from the burden.

I think that the learned Chief Justice had come to the right conclusion. I would dismiss the appeal. As the parties have requested, I would make no order as to costs.

Dated at _____ this _____ day of _____ 1988

A. Munafa

President.

Delivered in open court

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According to the majority view of the Judges of the Appeal is dismissed. There would be no order for costs

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22.7.88

In the Court of Appeal of Seychelles

Anglo Welsh Investments Ltd	Appellant
v	
Banque Francaise Commerciale Ocean Indien	Respondent

Civil Appeal 9 of 1987

Judgment of Goburdhun J A

I have had the advantage of reading in draft the judgment of Mustapha P, which fully states the law and the facts of this appeal and I do not have much to add.

The task before the court is to find out the meaning of the words "liability of the mortgagor under the mortgage" which appear in S. 31 (5) of the Lands Acquisition Act. Does S. 31 (5) extinguish only the security which a mortgage gives or does it extinguish the totality of the debt of the mortgagor as well?

According to me the answer is to be found in the very words of the text. It is to be noted that the word liability is qualified by the words "under the mortgage". I do not find any reason why the word mortgage should not be given its normal meaning. In my view 'mortgage' cannot mean both the debt and security. It can only mean the security. The definition of mortgage/Shroud's Judicial Dictionary is not relevant /in in our context.

According to a basic principle of interpretation a word or text which is clear and unambiguous does not call for any interpretation. Such a word or text should be given its normal meaning. In my view therefore the words "liability under the mortgage" being clear and unambiguous, do not call for any interpretation.

However as the case for the appellant has been argued and considered at length by all sides I have also considered the submissions made by counsel for the appellant but I have found them to be unconvincing.


In his judgment the learned Chief Justice referred to S. 37 and S. 39 of the Lands Acquisition Act and said the following:

"I believe that some guidance as to the meaning of S. 35(1) is provided by a consideration of SS. 37 and 39. S. 37 provides that once the mortgagee has been paid compensation, the mortgagor may require him to execute a discharge of the mortgage debt 'to the extent to which the mortgage debt is discharged by virtue of S. 31(5)'. This seems to imply that after acquisition the mortgage debt may be discharged fully or partially: if the compensation is not enough to pay the amount due in full, the liability of the mortgagor is reduced but not extinguished. S. 37 therefore suggests a qualified meaning for the phrase in S. 31(5) that speaks of 'extinguishing the liability of the mortgagor under the mortgage.'

S. 39 provides that where land is compulsorily acquired 'and the whole or a part of the mortgage debt is not discharged by virtue of this Act, the mortgagee retains, in respect of the whole or that part of the mortgage debt, as the case may be, his rights and remedies against the mortgagor (other than rights and remedies in relation to the land acquired)'. Would a mortgagee who has received compensation which discharges part of the mortgage debt have 'rights and remedies', if acquisition had the effect of extinguishing the liability of the mortgagor completely under S. 31(5)? Surely the phrase in S. 31(5) must be interpreted so as to leave the liability of the mortgagor for whatever portion of the mortgage debt is unpaid. It is with regard to that reduced portion of the debt that a mortgagee will still have some 'rights and remedies.'"

I endorse the views expressed in above extracts of the judgment and agree with the conclusion reached by the learned Chief Justice. I agree that the appellant cannot escape from his contractual obligations however harsh they may be.

I dismiss the appeal.



H Goburdhun
Justice of Appeal

Supreme Court, Victoria

June 1988

Delivered in open court

Goburdhun

Just
22-7-88