

**PRIVY COUNCIL.**

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PRANJIVANDAS JAGJIVANDAS MEHTA

v.

CHAN MA PHEE.

P.C.\*  
1916

March 20,  
21.

[ON APPEAL FROM THE CHIEF COURT OF LOWER BURMA, AT RANGOON].

*Mortgage—Equitable mortgage—Security, scope of—Title-deeds deposited as security, and endorsement made on promissory note given—Addition subsequently made to memorandum endorsed on note—Scope of security limited to original memorandum.*

Where title-deeds of property are handed over with nothing said except that they are to be security, the law supposes that the scope of the security is the scope of the title-deeds. Where, however, title-deeds are handed over accompanied by a bargain, that bargain must rule. Lastly, when the bargain is a written bargain, it, and it alone, must determine what is the scope and extent of the security.

*Shaw v. Foster* (1), per Lord Cairns, followed.

On obtaining a loan the defendants executed a promissory note, and made an endorsement on it: "As security, grant of a house in 14th Street," to which admittedly some months afterwards, words were added which caused the endorsement to read "As security, grant of a house in Strand Road and 14th Street." There was, in their Lordship's opinion, satisfactory evidence for the defendants of identification to show that the security consisted of only one house, and that the references to it in books of account and elsewhere, were always in the singular: and on the other hand the plaintiffs, the persons holding the security, on whom it lay to clearly satisfy the Court of the scope of the security, had failed to do so;

*Held*, therefore, (upholding the appellate decision of the Chief Court), that the scope of the security was limited by the original endorsement on the note.

APPEAL 89 of 1915 from a judgment and decree (6th May 1914) of the Chief Court of Lower Burma in its Appellate Jurisdiction, which varied a judgment and decree (16th August 1911) of the same Court in its Original Civil Jurisdiction.

\* PRESENT: LORD SHAW, SIR JOHN EDGE, AND SIR LAWRENCE JENKINS.

(1) (1872) L. R. 5 E. & I. App. 321, 340.

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The plaintiff was the appellant to His Majesty in Council.

This appeal raised questions as to whether the appellant held an equitable mortgage upon certain leasehold land and premises known as No. 92 Strand Road, Rangoon, which were purchased by the respondent in 1909 at a sale by auction in execution of a decree, and whether, if he holds such an equitable mortgage, he could assert it as against the respondent.

The Court of Original Jurisdiction (S. M. ROBINSON Judge) decided the case in favour of the plaintiff.

The Appellate Court (H. S. HARTNOLL, officiating Chief Judge, and D. H. R. TWOMEY, Judge) set aside the decree of the original Court so far as the present respondent is concerned, and dismissed the suit as against him.

The judgment, on appeal, in which the facts are stated, was delivered by Mr. TWOMEY (MR. HARTNOLL concurring) and was as follows :—

“ The plaintiff P. J. Mehta sued the 1st and 2nd defendants, Ma Saw and her husband Maung Thin, on a promissory-note for Rs. 13,000 executed by them on 1st June, 1906 in favour of R. Jagjivan and Company. P. J. Mehta, the plaintiff, alleged that the pro-note was subsequently endorsed to him for valuable consideration by R. Jagjivan and Company who also delivered to him the title deeds of certain immovable property which had been deposited with them as collateral security at the time of execution. The plaintiff asked that the balance of principal and interest due on the pro-note should be decreed in his favour and that a mortgage decree should be granted in respect of the property of which the title deeds were deposited as collateral security. He also prayed for a declaration that his equitable mortgage on the property in question should have priority over a later registered mortgage executed on 25th January 1908 by Ma Saw and her husband in favour of a Chetty firm for Rs. 15,000.

“ In July 1909 before the suit came to trial, the immovable property in question, viz., plots Nos. 65, 66 and 66-A in Block Z-1, also known as No. 92, Strand Road, was sold by auction in execution of a decree obtained by a stranger to this suit against Ma Saw in the Small Cause Court, Rangoon. In the proclamation of sale it was stated that the property was to be sold free from the Chetty's mortgage, but that M. Pranjivan

and Company (the firm of which P. J. Mehta is the proprietor) claimed an equitable mortgage on the property for Rs. 13,000 and interest. Thus it was clear from the proclamation that the purchaser would take the property clear from the Chetty's mortgage but liable for P. J. Mehta's equitable mortgage if the existence of that mortgage should afterwards be established.

"The property was bought by one Chan Ma Phee for Rs. 20,000.

"After the sale Chan Ma Phee, the auction purchaser, was joined as co-defendant in the suit brought by P. J. Mehta to establish his equitable mortgage. The plaintiff in a petition dated 21st July 1909 prayed that his lien on the property should be declared as against Chan Ma Phee.

Chan Ma Phee filed a written statement pleading that he had bought the property free from incumbrances and putting the plaintiff to strict proof of his title.

"The learned Judge on the Original Side has held it proved that at the time of the execution of the promissory note the title deeds of the property in suit were deposited as security and that the plaintiff had an equitable mortgage on the property purchased by Chan Ma Phee.

"The first ground of Chan Ma Phee's appeal is that the learned Judge erred in holding that the plaintiff had an equitable mortgage on the premises in question.

"Ma Saw, the borrower, was the successor in title of the original lessees of two adjoining sites at the Strand Road and of 14th Street. One of these sites, No. 67, has a frontage on 14th Street but is shut off from the Strand Road by the other site comprising plots 65, 66 and 66-A. These three plots together are known as No. 92, Strand Road, while plot No. 67 is known as No. 87, 14th Street. There is a large house on No. 92, Strand Road, and a small house on No. 87, 14th Street. The evidence shows that the same two houses were standing on the two sites at the time of the execution of the promissory note.

"Exhibit B is a 5 years' lease granted to one Maung Bwa on 2nd April 1884 for plot No. 106. From the evidence of Ba Shin, the Record-keeper, it would appear that No. 106 was renumbered as 65 and 66 in 1892-93. But this is not borne out by the plan attached to the lease of 2nd April 1884 according to which the plot applied for by Maung Bwa was that numbered 67 and was on 14th Street, while 65 and 66 are shown on Strand Road. That the land leased to Maung Bwa did not abut on Strand Road appears also from the lease (Exhibit C) granted in the same year (1st July 1884) to Ma Thit for plot No. 65 which, according to the plan at the foot of the lease, does abut on the Strand Road, and also from the deed of sale by U Bwa to Ma Thit (Exhibit D dated 5th January 1888) in which Maung Bwa's site No. 106 is described as "in 14th Street," no mention

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being made of Strand Road. There is further reason to doubt the accuracy of the Record-keeper's evidence for he says there was no plot numbered 65 in 1884, while Exhibit C is an actual lease of plot No. 65 in that year.

"Exhibit E is a conveyance dated 3rd January 1901 by one Ma Lin to Ko Tha Gywe of house site No. 88, 14th Street. (I gather that Ko Tha Gywe was Ma Thit's husband and that Ma Saw is their daughter.) This plot would seem very probably to be a portion of plot No. 66 from the boundaries mentioned in the conveyance.

"It is clear that the two areas known as No. 87, 14th Street and No. 92, Strand Road, have all along been held under separate title deeds. The plaintiff claims an equitable mortgage over both of them. They were both sold in the execution proceedings of July 1909 and the plaintiff himself bought the smaller property No. 87, 14th Street, for Rs. 4,000 odd while Chan Ma Phee, the appellant, bought the larger property No. 92, Strand Road, for Rs. 20,000. The plaintiff's case is that the two leases (or agreements to lease) Exhibits B and C and the two sale deeds Exhibits D and E were given over as security—when Ma Saw's predecessor in title, Maung Tha Gywe, first borrowed Rs. 5,000 on 10th October 1902 from the firm R. Jagjivan and Co. His claim rests, however, on the promissory note of 1st June 1906 for Rs. 13,000 signed by 'Ma Saw and endorsed by her with the note :—As security—Grant of a house in 14th Street.'

"The words 'Strand Road and' were afterwards written making the note appear as follows :—'As security—Grant of a house in Strand Road and 14th Street.'

"This addition was admittedly made several months after Ma Saw had signed the note.

"The entries in the books of account produced by the plaintiff to prove the various transactions with Ma Saw refer only to the mortgage of 'the house,' always in the singular.

"On the evidence produced by the plaintiff it cannot in my opinion be held that the title deeds of the Strand Road house were delivered to the lenders by way of security. The endorsement signed by Ma Saw at the time related only to the 14th Street house and the entries in the plaintiff's books, support the view that only one house and site was given as security. This documentary evidence appears to me to outweigh altogether the conflicting oral evidence of the plaintiff's witness, Nanalal Kalidas."

On this appeal,

*De Gruyther, K. C.*, and *J. M. Parikh*, for the appellant, contended that the equitable mortgage extended to both houses. The mortgage on No. 92, Strand Road was not distinct from that on No. 87, 14th Street, the

mortgage on the property in suit being in fact one transaction, and the Appellate Court was wrong in allowing a contention to the contrary to be raised as a pure question of fact for the first time on appeal. The two houses had not all along been held under separate title deeds; the title deeds of the Strand Road house were deposited with the lenders by way of security; the fact was that the plot No. 67 of the lease of 1908 was not identical with the plot No. 67 of the plan annexed to the lease of 2nd April 1884. At the time of the execution of the promissory note the whole of the leasehold property consisted of a house and stables which had subsequently come to be known as house No. 92, Strand Road, and house No. 87, 14th Street, respectively. The evidence on the record, it was contended, established that at the time the promissory note was executed the title deeds of the whole of the property were deposited with the lenders by way of equitable mortgage thereon, which was not, it was submitted, limited by the original memorandum endorsed on the promissory note, which was not the contract. Reference was made to *Ashton v. Dalton* (1), *Ex parte Kensington* (2), and Evidence Act (I of 1872), sections 91, 92.

*Sir Erle Richards, K.C.*, and *F.J. Coltman*, for the respondent, were not called on.

The judgment of their Lordships was delivered by LORD SHAW. Their Lordships think it unnecessary in this case to call upon learned counsel for the respondent. They are of opinion that the judgment of the Chief Court of Lower Burma appealed from is correct.

The rights of the parties have to be determined, in their Lordships' opinion by a written agreement,

(1) (1846) 2 Collyer 565.

(2) (1813) 2 Ves. & B. 79.

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which is, in their Lordships' view, the limit and standard fully measuring the obligations of Mah Saw, who obtained an advance of 13,000 rupees from the respondent on the 1st June, 1906.

On that date there was a notandum put upon the back of a promissory note then granted, and the notandum is to this effect: "As security, grant of a house in 14th Street, Rangoon." Their Lordships take no stock of an alteration made after that notandum was signed, by which there was an interpolation of the words "Strand Road and," which words would have, in appearance at least, extended the scope of the security from "a house in 14th Street, Rangoon," to "a house in Strand Road and 14th Street, Rangoon." Had an argument been raised as to whether, this alteration having been made, any rights in law could now be founded upon this document, that argument would have been considered: but it is unnecessary to make any pronouncement upon this topic, and accordingly their Lordships deal with the document signed by Mah Saw on the 1st June, 1906, as definitely limiting and describing the scope of the security. It was a "grant," in the singular, "of a house," in the singular, "in 14th Street, Rangoon."

The law upon this subject is beyond any doubt. (i) Where titles of property are handed over with nothing said except that they are to be security, the law supposes that the scope of the security is the scope of the title. (ii) Where, however, titles are handed over accompanied by a bargain, that bargain must rule. (iii) Lastly, when the bargain is a written bargain, it, and it alone, must determine what is the scope and the extent of the security. In the words of Lord Cairns in the leading case of *Shaw v. Foster* (1):—

"Although it is a well-established rule of equity that a deposit of a

(1) (1872) L. R. 5 E. & I. App. 321, 340.

document of title, without more, without writing or without word of mouth will create in equity a charge upon the property referred to, I apprehend that that general rule will not apply where you have a deposit accompanied by an actual written charge. In that case you must refer to the terms of the written document, and any implication that might be raised, supposing there were no document, is put out of the case and reduced to silence by the document by which alone you must be governed."

Their Lordships accordingly have admitted in argument the only possible question which remains (standing the document specifying the security and signed by Mah Saw), namely, the question of identification of the term "grant of a house in 14th Street, Rangoon." To identify this grant, a reference has been made by learned counsel for the appellant, to the various title-deeds of the properties called Plots 65, 66, 66A, and 67. These deeds are as follows: With reference to Plot 65, there is a lease of land in favour of a person named Ma Thit, who was the mother of Mah Saw. With reference to Plot 66, and apparently also to 66A, there is a document for sale of a house and of land in favour of Ma Thit. But then, with reference to the last document, namely, as to Plot 67, there is a "grant of a house," a conveyance of a house on the 3rd January, 1901, in favour of Ko Tha Gywe. Ko Tha Gywe was the husband of the grantee, or lessee, of the other plots of ground covered by the other documents. He was the father of Mah Saw, and it does occur as a matter of interest that this person, the father of Mah Saw, who had a conveyance of a house, that on Plot 67, was himself a borrower from the persons who are interested in this suit who were bankers and money-lenders in the district. On the 10th October, 1902, he borrowed a sum of 5,000 rupees from them; and a somewhat curious transaction took place, namely, that he deposited with the money-lenders, not only the title of the property belonging to himself, namely, the grant of the house,

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but also the title-deeds of the other three properties which belonged not to himself, but to his wife. It was on this occasion that all these titles found their way into the hands of the lenders. Mah Saw succeeded to Ko Tha Gywe in the ownership of the house on Plot 67.

Their Lordships have, in these circumstances, no doubt whatsoever that the identification of the "grant of a house in 14th Street, Rangoon," by her is accomplished by a reference to the conveyance of the house in favour of Ko Tha Gywe, which house had been his property when the original advance of 5,000 rupees, some years before, was obtained by him.

Their Lordships finally remark that, as against this identification of the house in 14th Street there is no evidence at all satisfactory in this case, and it was for the persons holding this security clearly to satisfy the Court of the scope thereof. They have not done so. There is nothing in the case which confirms the view that, under the term "grant of a house," which would be a singular term applicable to a singular title, there was included the subject of three other plots of land under leases. Their Lordships cannot assent to such a construction. They think the security is distinctly and by contract limited, and they cannot extend it as desired. They have no doubt that the Chief Court of Lower Burma has reached a proper conclusion.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

J. V. W.

*Appeal dismissed.*

Solicitor for the appellant: *Edward Dalgado.*

Solicitors for the respondent: *Arnould & Son.*