PRIVY COUNCIL.

P. C.* 1922

Dec. 20.

SUBRAMONIAN AND ANOTHER (PLAINTIFFS)

v.

LUTCHMAN AND OTHERS (DEFENDANTS).

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

Registration—Equitable mortgage—Deposit of deeds—Document constituting the bargain—Indian Evidence Act (I of 1872), s. 91—Indian Registration Act (XVI of 1908), s. 17—Receiver—Dissolution of partnership—Power to mortgage.

When upon a mortgage by deposit of title deeds a document is drawn up constituting the bargain between the parties, the document is not admissible in evidence to prove the mortgage unless it is registered under the Indian Registration Act, and oral proof of the mortgage is inadmissible.

Kedarnath Dutt v. *Shamloll Khettry* (1) and *Pranjivandas Mehta* v. *Chan Ma Phee* (2) followed.

A receiver appointed to take charge of the property of a firm pending proceedings for a dissolution, with power to do all things necessary for the realization and preservation of the assets, has no power to mortgage the property without the sanction of the Court.

Judgment of the Chief Court affirmed.

APPEAL (No. 203 of 1919) from a judgment and two decrees of the Chief Court in its appellate jurisdiction (January 24, 1916) reversing a decree of Young J. (August 25, 1914).

The suit was brought in the Chief Court of Lower Burma by Mallady Sathalingum, since deceased, and represented by the appellants, his executors, against the respondents, of whom Nos. 1 to 8 had been members of two dissolved firms of Chettys, No. 9 was the

* *Present*: LORD ATKINSON, LORD SUMNER, LORD PARMOOR, LORD CARSON AND MR. AMEER ALI.

(1) (1873) 11 B. L. R. 405.

(2) (1916) I. L. R. 43 Calc. 895, 900; L. R. 43 I. A. 122, 125.

receiver appointed in the dissolution proceedings, and No. 10 was one Ebrahim Seedat. The claim was to enforce a mortgage, dated August 26, 1910, against the respondents; a claim upon the personal remedy was abandoned.

The facts of the case appear from the judgment of the Judicial Committee.

The trial Judge (Young J.) held that the receiver had no power to create the mortgage, without the sanction of the Court, save so far as it related to properties included in a prior equitable mortgage. He made a decree accordingly.

Upon cross appeals to the appellate jurisdiction the suit was dismissed. The learned Judges held that the receiver had no power to mortgage; they therefore did not find it necessary to consider whether the prior equitable mortgage was invalid for want of registration.

Powell, K.C., *Preedy* and *Dube*, for the appellants. If the mortgage of 1910 was invalid, the plaintiffs can still rely upon the equitable mortgage of 1908. The equitable mortgagee was throughout entitled to call for a legal mortgage: *Carter* v. *Wake* (1). Equity will not presume an intention to abandon that right upon the new mortgage being given: *Locking* v. *Parker* (2), *Kehoe* v. *Hall* (3); Fisher on Mortgages, 6th ed., ss. 1559, 1560. That principle has been applied in India: *Gokuldoss Gopaldoss* v. *Rambux Sheochand* (4), *Arumugam Pillai* v. *Periasami* (5); Ghose on Mortgages, p. 550. The transaction was completed by the deposit; there was no necessity to register. It is further submitted that the receiver had

(1) (1877) 4 Ch. D. 606.
(2) (1872) L. R. 8 Ch. 30, 38.
(3) (1843) 5 Ir. Eq. 597.
(4) (1884) L. R. 11 I. A. 126.
(5) (1896) I. L. R. 19 Mad. 160.

1922

SUBRAMONIAN v. LUTCHMAN.

authority from Seedat to deposit the deeds, apart from his powers under the order appointing him.

Dunne, K.C., and *Kenworthy Brown*, for the respondent. It is clear that the receiver had no power to create the mortgage of 1910. The mortgage of 1910 cannot be proved in the absence of registration. The document drawn up embodied the terms of the agreement between the parties, consequently no oral evidence was admissible under s. 91 of the Evidence Act, and registration was necessary under s. 17 of the Registration Act: *Kedarnath Dutt* v. *Shamlol Khettry* (1), *Dwarkanath* v. *Sarat Kumari* (2), *Esther Isac* v. *Martu Mull* (3), *Bhoibrab Chandra* v. *Anath Nath* (4). Further, the memorandum required stamping under the Indian Stamp Act (II of 1899) amended by Act XV of 1904, s. 8, Sch. I (*6*). [Reference was also made to *Pranjivandas Mehta* v. *Chan Ma Phee* (5) and *Credland* v. *Potter* (6)].

Powell, K. C., in reply. The charge in 1908 was created by the deposit, not by the document.

Dec. 20.

The judgment of their Lordships was delivered by LORD CARSON. On July 15, 1908, the firms of Chettys owed to the original plaintiff, Mallady Sathalingum, whose executors the present appellants are, a considerable sum of money, and as security for the same deposited with him by way of equitable mortgage title deeds relating to certain properties of the defendant Seedat, which deeds had been deposited with the said firm by the said Seedat. On the occasion of the

(1) (1873) 11 B. L. R. (O. C. J.) 405.
(2) (1871) 7 B. L. R. (O. C. J.) 55.
(3) (1916) 25 C. L. J. 160.
(4) (1920) 31 C. L. J. 375.
(5) (1916) I. L. R. 43 Calc. 895; L. R. 43 I. A. 122.
(6) (1874) L. R. 10 Ch. 8.

deposit a memorandum was signed and delivered to the said plaintiff in the following terms :—

"From M. L. R. M. A. Soliappa Chetty and A. L. A. "S. R. M. Chetty, Rangoon. To Mallady Sathalingum, "Rangoon.

"Dated Rangoon, July 15, 1908.

"DEAR SIR,

"We hand you herewith title deeds relating to "fifth class Lot Nos. 78, 79 and 80, Block E, each "measuring 25 by 50, with building thereon belonging "to Saleman Ahmed Seedat, also his promissory note "for rupees sixty-three thousand (Rs. 63,000) due us, "this please hold as security against advances made to "us; we also hand you second mortgage executed in "our favour by C. Ranga Sawmy Moodaliar on 1st "class lot No. 6 in Block Fl. On this we had "advanced Rs. 32,000. Please also hold this as further "security against advances made to us. We promise "not to deal with same till your amount due you is "fully paid and satisfied." This document was signed by the Chettys and witnessed.

The document was not registered, and the effect of non-registration will have to be considered later. On December 17, 1909, the plaintiff sent to the firms of Chetty and the respondent Seedat notices demanding repayment of the money due and interest. In the year 1910 a suit was brought for the dissolution of the said Chetty firms, and on April 5, 1910, Ramanathan Chetty was appointed receiver by an order of the Court in the suit in the following terms: "It is ordered that M. A. R. A. R. Ramanathan Chetty be and he is hereby appointed receiver on a monthly remuneration of Rs. 300 (three hundred only) to take charge of the property of the Chetty firms of M. L. R. M. A. and A. L. A. S. R. M. pending the decision of the suit for dissolution of partnership, with power to collect outstandings and

1922

SUBRAMONIAN v. LUTCHMAN.

do all things necessary for the realisation and preservation of the assets of the said firm."

The receiver so appointed and the members of the Chetty firms being anxious to realize the debt due to them by Seedat, wrote to the plaintiff for the promissory note and the title deeds deposited with the plaintiff on July 15, 1908, in order to enable them to carry on proceedings against Seedat, and the plaintiff handed them over on condition that he received payment from the fruits of the decree. No suit, however, was brought, but Seedat gave the Chetty firms a legal mortgage dated August 26, 1910, over the properties included in the original equitable mortgage and also other properties which were not so included. The plaintiff agreed to this compromise upon condition that the mortgage of August 26, 1910, was deposited with the plaintiff and also the title deeds relating to the properties included in it as collateral security for the money owing by the Chetty firms to the plaintiff. This deposit was carried out, and on this occasion a memorandum setting forth the deposit was signed by the receiver; it is dated September 4, 1910. The present action was brought by the plaintiff as equitable mortgagee to enforce payment of the debt due to him by sale of the properties mortgaged by the said mortgage of August 26, 1910.

At the trial of the action before Young J., it was contended that the original sub-mortgage of 1908 was void, inasmuch as it was effected by an instrument in writing which was admittedly not registered and that it was inadmissible in evidence on the same ground. The learned Judge, however, held that it was admissible, as being a record of an already completed transaction.

It was also contended that the old equitable mortgage had been surrendered and that the plaintiff was

suing on a new mortgage, which was *ultra vires*, the receiver who had not obtained the leave of the Court. The learned Judge held, however, that so far as the new legal mortgage so deposited related to the property included in the former equitable mortgage "there was not an iota of difference between the return of the title deeds and the return of them accompanied by the deposit of the legal mortgage," and he accordingly gave a decree for the usual accounts and for sale in default of payment of the properties included in the original memorandum of deposit. There was an appeal by the plaintiff to the Chief Court of Lower Burma from this judgment so far as it disallowed his claim to an equitable sub-mortgage on the new and additional properties included in the mortgage of August 26, 1910; and there was also an appeal from this judgment by the first defendant in so far as it allowed the claim of the plaintiff to an equitable sub-mortgage of the properties originally pledged.

The Appellate Court on January 24, 1916, set aside the decree of the original Court and dismissed the plaintiffs' claim, holding that by the events which had happened the original mortgage by deposit was extinguished and no deposit of deeds by the receiver of the Chetty firms was authorized by the order appointing him.

The Chief Judge, Sir Charles Fox, who gave the judgment of the Court, stated that it was unnecessary to deal with the vexed question whether the memorandum of July 15, 1908, required registration. From this judgment and the decrees made under it the present appeal has been brought.

It was not seriously contended before their Lordships that the receiver had any authority under the order of April 5, 1910, to mortgage property of the

1922

SUBRAMONIAN v. LUTCHMAN.

firms, and on this point their Lordships are in agreement with the decree of the Appellate Court. The plaintiffs' chief effort before this Board was directed to supporting the order of Young J., basing their claim upon the original sub-mortgage of July 15, 1908. The respondents' counsel, on the other hand, raised the objections which had also been made at the trial of the action: (i) that the original sub-mortgage was void, inasmuch as it was affected by an instrument in writing which was admittedly not registered, and relied upon ss. 17 and 49 of the Indian Registration Act, 1908; and (ii) that oral evidence was not admissible, as the memorandum of July 15, 1908, constituted the contract between the parties (Indian Evidence Act, 1872, s. 91). The appellants, however, contended that though the terms of the deposit were embodied in a written document that document was a mere memorandum of and did not constitute the contract and therefore did not require to be registered, and that on the same ground oral evidence was admissible to prove and explain the deposit.

As already stated, the trial Judge acceded to this argument.

This Board, however, cannot agree with the view taken by the trial Judge. The law upon the subject admits of no doubt. In the case of *Kedarnath Dutt* v. *Shamloll Khettry* (1), Couch C. J. said: "The rule with "regard to writings is that oral proof cannot be substi- "tuted for the written evidence of any contract which "the parties have put into writing. And the reason "is that the writing is tacitly considered by the parties "themselves as the only repository and the appro- "priate evidence of their agreement. If this memo- "randum was of such a nature that it could be treated "as the contract for the mortgage and what the parties

(1) (1873) 11 B. L. R. (O. C. J.) 405.

"considered to be the only repository and appropriate "evidence of their agreement, it would be the instru- "ment by which the equitable mortgage was created, "and would come within section 17 of the Registration "Act."

This Board in *Pranjivandas Mehta* v. *Chan Ma Phee* (1) laid down the law as follows: "The law upon this subject is beyond any doubt: (i) Where titles 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 extent of security.

"In the words of Lord Cairns in the leading case of *Shaw* v. *Foster* (2), 'although it is a well-established rule of equity that a deposit of a 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 when 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 was no document, is put out of the case and reduced to silence by the documents by which alone you must be governed.'"

Applying the principles thus laid down to the present case, what this Board has to determine is did the document of July 15, 1908, constitute the bargain between the parties, or was it merely the record of an already completed transaction?

The only evidence upon this subject, in their Lordships' opinion, is conclusive that the memorandum of

(1) (1916) I. L. R. 43 Calc. 895, 900; (2) (1872) L. R. 5 H. L. 321, 341. L. R. 43 I. A. 122, 125.

1922

SUBBA-MONIAN v. LUTCHMAN.

July 15, 1908, constituted the bargain between the parties. The plaintiffs' agent swore. "The arrangement to deposit their title deeds was made in the presence of the eldest son of E. Solomon," and when we turn to S. Solomon's evidence, he says: "The document was drafted and typed in my office after they had come to an agreement. The document was drawn up at the time they came together"; and upon cross-examination he says: "The agreement was signed and handed over in my presence. Unless the title deeds had been handed over he would not have accepted Ex. I (the memorandum of July 15, 1908). The transaction was completed in my office at the same time."

Turning to the document itself, one is led to the same conclusion. We hand you *herewith* title deeds, etc. . . . This please hold as security, etc. . . . Please also *hold this* as further security."

Their Lordships have no doubt therefore that the memorandum in question was the bargain between the parties, and that without its production in evidence the plaintiff could establish no claim, and as it was unregistered it ought to have been rejected.

It has already been stated that the receiver was not under the order appointing him authorized to create any mortgages of the partnership property, and therefore the claim of the plaintiff fails both in respect of the original equitable deposit and the subsequent deposit in August, 1910.

For these reasons their Lordships will humbly advise His Majesty that the appeal of the plaintiff should be dismissed with costs.

Solicitors for the appellants: *Stoneham & Sons.*

Solicitors for the respondent No. 10: *Sanderson, Lee, Eddis & Tennant.*

A. M. T.