APPELLATE CIVIL.

1932

Jan. 15, 19, 20; *Feb.* 2.

Before Mukerji and Guha JJ.

NABADWEEPCHANDRA DAS

v.

LOKENATH RAY.*

Attachment—Court-house, affixing of prohibitory order on—Mortgage lien—Registration, effect of—Transferor—Gift—Sale—Transfer—Mortgagor—Indian Registration Act (XVI of 1908), s. 47—Transfer of Property Act (IV of 1882), ss. 2, 122, 129—Code of Civil Procedure (Act V of 1908), s. 64; Appendix E, form No. 24.

To render an attachment effectual, the affixing of the prohibitory order on the court-house is absolutely necessary and where such affixing was later in date than the execution of a mortgage, its lien was not affected by the attachment.

Muthiah Chetti v. *Palaniappa Chetti* (1) referred to.

Since section 47 of the Registration Act lays down that a document, which is registered, operates from the time of its execution and not from the time of its registration, this operation, by virtue of section 47 of that Act in respect of a deed duly executed but not registered, is not in any way affected by an attachment effected in the meantime, having regard to the provision contained in section 64 of the Code of Civil Procedure.

While registration is a necessary solemnity in order to the enforcement of a mortgage of immoveable property, it does not suspend the mortgage until registration actually takes place.

Venkatsubba Shrinivas Hedge v. *Subba Rama Hedge* (2) and *Kalyanasundaram Pillai* v. *Karuppa Mooppanar* (3) followed.

The decisions in *Atmaram Sakharam Kalkye* v. *Vaman Janardhan Kashelikar* (4) and in *Venkati Rama Reddi* v. *Pillati Rama Reddi* (5) are clear authorities for the proposition, which has obtained the approval of the Judicial Committee in *Kalyanasundaram Pillai's* case (3), that incompleteness due to want of registration is not a thing of which the executant can take any advantage and that, if the instrument is otherwise complete, the executant is to be regarded as having done everything that was in his power to complete the transfer and to make it effective.

*Appeals from Original Decrees, Nos. 339 of 1928 and 251 of 1929, against the decrees of Shreeshchandra Ray, Third Subordinate Judge of Tippera, dated May 31, and Sep. 1, 1928, respectively.

(1) (1928) I. L. R. 51 Mad. 349; L. R. 55 I. A. 256.
(2) (1928) I. L. R. 52 Bom. 313.
(3) (1926) I. L. R. 50 Mad. 193; L. R. 54 I. A. 89.
(4) (1924) I. L. R. 49 Bom. 388.
(5) (1916) I. L. R. 40 Mad. 204.

Form No. 24 of Appendix E to the Code of Civil Procedure, which is the form of a prohibitory order for attachment of immoveable property, shows that by such an order the judgment-debtor is prohibited and restrained from transferring or charging the property by sale, gift or otherwise, and all persons are prohibited from receiving the same by purchase, gift or otherwise.

But where the transferor had done all that lay in his power to complete the transfer and to make it effective and the transferee had already taken the charge, which had been created in his favour by the mortgagor, and all that remained was the solemnity of registration to be gone through which was necessary to make it enforceable, the attachment of the mortgaged property before the registration of the mortgage deed did not affect the mortgage.

FIRST APPEALS by different sets of defendants.

The facts of the case and the arguments advanced at the hearing thereof appear fully in the judgment.

Amarendranath Basu and *Surendramohan Ghosh* for the appellants.

Atulchandra Gupta and *Bhageerathchandra Das* for the respondents in both appeals, and *Krishnakishore Basak* (only in Appeal No. 339 of 1928).

Cur. adv. vult.

MUKERJI AND GUHA JJ. These two appeals have arisen out of a suit for foreclosure on a mortgage by way of conditional sale and are from the preliminary and the final decrees passed therein. The defendants Nos. 6, 7, 8 and 11 are the appellants.

The defendant No. 1 is the mortgagor. He executed the mortgage on the 23rd June, 1916. On the same day, after being duly signed and attested, the deed was presented for registration and the executant's admission was taken, but the registration was not complete till the 27th June, 1916, which is the date the certificate of registration bears. The defendant No. 26, having obtained a decree for money in Money Suit No. 153 of 1915 against the defendant No. 1 on the 18th May, 1916, put it into execution, and, on the 20th June, 1916, obtained an order for attachment in respect of eight of the properties covered by the mortgage. Two out of these eight properties are concerned in this appeal. On the 21st June, 1916, the writ of attachment was signed and issued and

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made over to the peon. As regards the said two properties, the prohibitory order was served in the locality on the 22nd June, 1916, but was not posted in the court-house till the 24th. On the 24th February, 1917, the attached properties were sold in auction and purchased by the defendant No. 26. After the sale was confirmed and possession was delivered to the defendant No. 26, he sold the said eight properties to the defendant No. 29 on the 25th May, 1919. On the 3rd January, 1921, the defendant No. 29 sold the two properties, with which we are concerned, to the appellants.

The first question we have been called upon to determine is what was the effect of the attachment upon the mortgage which the defendant No. 1 made. In the court below the appellants rested their claim upon the ground that the attachment was prior to the execution of the mortgage. This contention was resisted on behalf of the plaintiffs on the ground that to render an attachment effectual the affixing of the prohibitory order on the court-house is absolutely necessary and, inasmuch as such affixing was later in date than the execution, the mortgage lien was not affected by the attachment. The court below upheld the plaintiffs' contention. It is not disputed now that the view which the court below has taken is correct; and indeed the correctness of the view can no longer be disputed: see *Muthiah Chetti* v. *Palaniappa Chetti* (1). But, in this Court, it has been argued on the appellants' behalf that, in view of section 59 of the Transfer of Property Act, no right was created under the deed until it was registered and that, inasmuch as the registration admittedly took place after the attachment had been effectively made, the mortgage was, having regard to section 64 of the Code of Civil Procedure, void against all claims under the attachment. There is very little authority directly bearing on the question that has to be considered, the only decision in which something like the present

(1) (1928) I. L. R. 51 Mad. 349 ; L. R. 55 I. A. 256.

question was dealt with is the case of *Veerakutty Koundan* v. *Ramasami Asari* (1). In that case it was held that where, between the dates of the execution and of the registration of a mortgage deed, another unregistered mortgage bond is sued upon and the mortgaged properties are attached, that mortgage does not acquire priority over the registered mortgage either by reason of the decree thereon or by an attachment order obtained in the suit. The effect of an attachment, however, does not appear to have been specifically considered in that case and so the decision is not of much assistance.

A number of decisions have been relied upon by the appellants to fix the point of time at which a document can be said to be registered: *Rohimoonissa v. Abdoollah Khan* (2), *Hardei* v. *Ram Lal* (3), *Veerappa Chetty* v. *Kadiresan Chetty* (4) and *Muhammad Ewaz* v. *Birj Lall* (5). It is unnecessary to discuss these cases, because it can never be and indeed has not been contended on behalf of the respondent that the mortgage deed in the present case was a registered document at the date when the attachment was effected. It has then been contended that, in the case of a document, of which registration is compulsory, title does not pass until registration has been effected: *Papireddi* v. *Narasareddi* (6), *Sheo Narain Singh* v. *Darbari Mahton* (7), *Tilakdhari Singh* v. *Gour Narain* (8). But section 47 of that Act says that a document, which is registered, operates from the time of its execution and not from the time of its registration. The real question to be considered, therefore, is whether this operation, by virtue of section 47 of the Act in respect of a deed duly executed but not registered, is in any way affected by an attachment effected in the meantime, having regard to the provision contained in section 64 of the Code of Civil Procedure.

(1) (1915) 32 Ind. Cas. 431.
(2) (1874) 22 W. R. 319.
(3) (1889) I. L. R. 11 All. 319.
(4) (1913) 24 Mad. L. J. 664, 667.
(5) (1877) I. L. R. 1 All. 465 L. R. 4 I. A. 166, 175.
(6) (1892) I. L. R. 16 Mad. 464.
(7) (1897) 2 C. W. N. 207.
(8) (1920) 5 Pat. L. J. 715.

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In some recent decisions of Indian courts, the effect of non-registration in the case of deeds of gift, of which registration is compulsory under the law, has been considered, and these decisions have subsequently been examined by the Judicial Committee. In the case of *Kalyanasundaram Pillai* v. *Karuppa Mooppanar* (1), the facts were these:—A Hindu executed a deed of gift of part of his immoveable property and delivered it to the donee, and, on the following day, adopted a son, and, three days after, he registered the deed. It was held that, on delivery of the deed to the donee, there was acceptance of the transfer within the meaning of section 122 of the Transfer of Property Act, 1882, and thereafter the gift became effectual subject to registration as required by section 123. The opinions of the learned Judges of the Division Bench of the Madras High Court in that case will be found in *Kalianasundaram Pillai* v. *S. Krishnaswami Aiyar* (2), and the judgment in the Letters Patent Appeal therein is reported in *Kaliansundaram Pillai* v. *Karuppa Muppanar* (3). The same principle was laid down by the Judicial Committee in the case of *Venkatsubba Shrinivas Hedge* v. *Subba Rama Hedge* (4), the judgment of the Bombay High Court in which case is reported in *Subba Rama Hedge* v. *Venkatsubba Shriniwas Hedge* (5),—their Lordships repeating what they had said in the case of *Kalyanasundaram Pillai* v. *Karuppa Mooppanar* (1). In *Kalyanasundaram Pillai's* case (1), their Lordships said, "They are unable to see "how the provision of section 123 of the Transfer of "Property Act can be reconciled with section 47 of the "Registration Act, except upon the view that, while "registration is a necessary solemnity in order to the "enforcement of a gift of immoveable property, it "does not suspend the gift until registration actually "takes place. When the instrument of gift has been "handed by the donor to the donee and accepted by

(1) (1926) I. L. R. 50 Mad. 193 ; L. R. 54 I. A. 89.
(2) (1920) 62 Ind. Cas. 280.
(3) [1923] A. I. R. (Mad.) 282 ; 73 Ind. Cas. 206.
(4) (1928) I. L. R. 52 Bom. 313.
(5) (1924) I. L. R. 48 Bom. 435.

"him, the former has done everything in his power to "complete the donation and to make it effective. "Registration does not depend upon his consent, but "is the act of an officer appointed by law for the "purpose, who, if the deed is executed by or on behalf "of the donor and is attested by at least two witnesses, "must register it if it is presented by a person having "the necessary interest within the prescribed period. "Neither death, nor the express revocation by the "donor, is a ground for refusing registration, if the "other conditions are complied with." Applying these observations, if they are applicable, to the case of a mortgage, it may well be said that, while registration is a necessary solemnity in order to the enforcement of a mortgage of immoveable property, it does not suspend the mortgage until registration actually takes place.

It has been contended, however, that what was laid down by their Lordships of the Judicial Committee in the case aforesaid has no bearing upon the question now before us. This has been said, firstly, because by reason of sections 2 and 129 of the Transfer of Property Act, 1882, the Hindu law, which requires delivery of possession to complete a gift, applied, whereas it is too late now to contend that, under the Hindu law, possession is necessary to complete the title of the transferee in any other case of transfer [*Kalidas Mullick* v. *Kanhaya Lal Pundit* (1)]; and secondly, because what was really considered by the Judicial Committee was a very different question, namely, whether a donor, having done all that he had to do to make a valid gift and when all that was necessary to make it effective was done and the document was incomplete merely on account of non-registration, could himself turn round and revoke the gift.

As regards the first of these grounds, it is difficult to see how the distinction pointed out enures to the benefit of the appellants. The Hindu law or section 122 of the Transfer of Property Act, 1882, only

(1) (1884) I. L. R. 11 Calc. 121; L. R. 11 I. A. 218.

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imposes an additional condition for the gift to be effective, the provision for registration remaining the same in the case of gifts as well as in the case of mortgages.

So far as the second ground is concerned, it is true that the present question was not the question before the Judicial Committee. But their Lordships' decision, carefully read, does not seem to us to proceed upon a disqualification attaching to the donor personally by reason of the fact that he had executed the deed of gift and handed it over to the donee: it proceeds upon a consideration of the legal position created by the fact that the gift was complete, except for the registration. Their Lordships quoted a passage from the judgment of the learned Chief Justice of the Madras High Court in the case under appeal and did not express their dissent from it. On the other hand, their Lordships affirmed the judgment and the decrees appealed from. The passage runs thus "The effect of these sections (*i.e.*, sections 47 and "49 of the Registration Act) in my judgment is that "if a title is complete except for registration, no "subsequent alienation or dealing with the property "by the vendor or donor as the case may be can defeat "the title which on registration becomes an absolute "title dating from the date of the execution of the "document." It will be seen that the observations just quoted include not merely gifts but also sales. Their Lordships observed that they were in complete agreement with the Full Bench decision of the Bombay High Court in the case of *Atmaram Sakharam Kalkye* v. *Vaman Janardhan Kashelikar* (1) and also approved of the Full Bench decision of the Madras High Court in the case of *Venkati Rama Reddi* v. *Pillati Rama Reddi* (2), subject to a qualification as to acceptance of the gift arising by reason of section 122 of the Transfer of Property Act. These Full Bench decisions, as well as the two dissenting judgments in the former of the two cases, dealt very fully with the question whether

(1) (1924) I. L. R. 49 Bom. 388. (2) (1916) I. L. R. 40 Mad. 204.

an executant of a deed compulsorily registrable has any *locus penitentiae* to resile, by reason of the fact that the title under it is incomplete for want of registration. These decisions are clear authorities for the proposition, which has thus obtained the approval of the Judicial Committee, that incompleteness due to want of registration is not a thing of which the executant can take any advantage and that, if the instrument is otherwise complete, the executant is to be regarded as having done everything that was in his power to complete the transfer and to make it effective.

To consider the effect of section 64 of the Code of Civil Procedure, the true nature of an order of attachment has to be realised. Form No. 24 of Appendix E to the Code is the form of a prohibitory order for attachment of immoveable property. It shows that, by such an order, the judgment-debtor is prohibited and restrained from transferring or charging the property by sale, gift or otherwise, and all persons are prohibited from receiving the same by purchase, gift or otherwise. At the stage at which the attachment in the present case was effected, the transferor had done all that lay in his power to complete the transfer and to make it effective and the transferee had already taken the charge, which had been so created in his favour, and all that remained was the solemnity to be gone through which was necessary to make it enforceable. We are, accordingly, of opinion that the attachment, such as it was in the present case, did not affect the mortgage. The result is that, in our judgment, the purchase by the defendant No. 26 cannot prevail over the plaintiff's mortgage lien.

In the view we have taken of the aforesaid matter no other question calls for our decision. But, as two other questions have been argued before us on behalf of the appellants, we think it right to record our views thereon.

One of these contentions was that the Subordinate Judge was in error in holding that the defendant

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No. 29 in the matter of the purchase that he made from the defendant No. 26 was merely a *benâmdâr* for the defendant No. 1. We have examined the materials, bearing upon this question, in the light of the arguments addressed to us and we must say we are unable to come to any different conclusion. A careful perusal of the deposition of the defendant No. 29 himself, apart from the other materials, to which the learned Judge has referred, confirms us in the view that we take of this transaction. The scheme involved in this *benâmi* is a matter of some nicety and complication. The Subordinate Judge has gone into it in detail and with care and we are of opinion that his appreciation of it is correct. It will serve no useful purpose to repeat it here.

The other contention is that the equities arising in favour of the appellants, on the footing that they were *bona fide* purchasers for valuable consideration from the defendant No. 29 and without notice of the defendant No. 1's title, have not been considered by the court below. The Subordinate Judge appears to have disposed of this question with the remark that section 41 (or section 43 ?) of the Transfer of Property Act is not applicable to the case. This remark of his, no doubt, does not adequately dispose of the question, but we do not know in what form the question was presented before him. Be that as it may, we have tried to come to a conclusion of our own on this question and we are met with the difficulty at the outset that the materials before us are, in our view, utterly insufficient to establish the fact or show such conduct on their part as would lead to the inference that they were *bona fide* purchasers. The only materials on the record to which they may point for a finding in their favour, so far as this matter is concerned, is the evidence of the defendant No. 8, Ramdayal, which in some material respects is in conflict with what defendant No. 29 has deposed, and with the evidence of the witness, Jabbar Ali. We have perused this evidence with care but we are

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unable to hold in favour of the appellants. Apart from everything else the evidence makes it clear that no enquiry was made by the purchasers to satisfy themselves as regards their vendor's title.

The result is that these appeals should, in our opinion, be dismissed with costs to the plaintiffs respondents and we order accordingly. One set of hearing-fee will be assessed in the two appeals.

The appellants will be allowed time for three months more from today for redemption on payment of the amounts mentioned in the decree of the court below.

Appeals dismissed.

G. S.