

PRIVY COUNCIL.

IMPERIAL BANK OF INDIA

v.

BENGAL NATIONAL BANK (*In Liquidation*).P.C.*
1931April 16, 1931
May 31.

[ON APPEAL FROM THE HIGH COURT AT CALCUTTA.]

Mortgage—Debenture—Debenture not registered under Registration Act—Charge on all assets—Book debts—Book debts secured on immovable property—Transfer of debt without transfer of security—“Actionable claim”—Transfer of Property Act (IV of 1882, amended by II of 1900), ss. 3, 6, 130.

As security for a loan, the respondent bank issued to the appellant bank debentures, creating a floating charge upon their whole undertaking, properties, assets, and interests, present and future. The debentures were registered under the Indian Companies Act, 1913, but not under the Indian Registration Act, 1908. On April 27, 1927, the respondent bank suspended payment, whereupon, by the terms of the debentures, the charge became fixed. An admission precluded the appellant bank from contending in the liquidation that the debentures, although not registered under the Registration Act, gave them a charge upon any immovable property.

Held that nevertheless the appellant bank, by virtue of the debentures, had a charge over the debts due to the respondent bank, whether secured on immovable property or not, and were entitled to the benefit of all sums received after April 28, 1927, in reduction of the debts, whether from the realization of securities or otherwise.

The definition of “actionable claim” added to section 3 of the Transfer of Property Act, 1882, by Act II of 1900, and section 130 with the subsequent sections thereby substituted for the corresponding sections of the Act of 1882, do not prevent a debt secured upon immovable property from being transferred apart from the security; the disability was not expressed, was inconsistent with section 6, and would give rise to anomalies.

Decree of the High Court (1) reversed.

APPEAL (No. 112 of 1930) from an order of the High Court in its appellate jurisdiction (March 18, 1930), affirming an order of the court in its original jurisdiction (August 26, 1929).

The present appeal arose out of an application to the High Court by the liquidators of the respondent bank for directions, having regard to two debentures issued by the respondent to the

*Present: Lord Blanesburgh, Lord Atkin and Sir George Lowndes.

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appellant bank. The questions submitted were as to, among other points, the respective rights of the appellant bank and the general body of the creditors in title deeds deposited with the respondent bank as security for loans and overdrafts, the properties to which the deeds related, and the proceeds thereof.

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

In a debenture holders' suit brought by the appellant bank and heard by Costello J. it had been admitted on their behalf that, in the absence of registration of the debentures under the Indian Registration Act, they did not affect any immovable property and that admission had been embodied in the decree made in the suit on March 26, 1928, by Costello J.

The application for directions was heard by Buckland J. The learned Judge held that, whether or not the security held by the appellant bank under the debentures was valid and effective as regards the debts, it was not valid and effective as regards any title deeds originally deposited with the respondent bank in cases in which possession of the deeds had not been given to the appellant bank.

An appeal was dismissed by a judgment delivered by Rankin C. J., and concurred in by C. C. Ghose J. (1).

W. A. Greene K. C. (with him *G. D. McNair*) for the appellants. It must be conceded by the appellants that the admission embodied in the decree of Costello J. of March 26, 1928, precludes them from contending that they can claim in respect of title deeds deposited with the respondent bank. But for the admission, they would contend that, as the debentures, which were registered under the Indian Companies Act, gave merely a floating charge, they did not require registration under the Indian Registration Act, especially as to securities not in the hands of the respondents when the debentures

(1) (1930) I. L. R. 58 Calc. 136.

were issued. But, in any case, the absence of registration under that Act does not prevent the appellants from enforcing their security against the book debts, whether secured upon immovable property or not. Having regard to the terms of section 49 of the Act, the debentures could be received in evidence of the charge upon book debts, even though inadmissible upon a claim in respect of the immovable securities: *Vyavan Chetti v. Subramanian Chetti* (1). The definition of an "actionable claim", added to the Transfer of Property Act, 1882, by section 2 of the amending Act II of 1900, and the amendments of sections 130 to 132 do not prevent a debt from being transferred without a transfer of immovable security held for the debt. Each is property, which by section 6 of the Act of 1882 is transferable, and a debt severed from the security is movable property. If Act II of 1900 results in a debt, for which immovable security has been given, being itself immovable property, anomalous and inconvenient results would follow. For instance, a transfer of a debt would be invalid if the transferor held, possibly unknown to the transferee, immovable security for all debts owing by the particular creditor. Further, if the debt was unsecured when transferred, would the transfer become unenforceable upon the debtor afterwards giving security? A transfer of a debt without a transfer of the security does not prejudice the debtor. The transferee, joining the transferor as a party, can sue for the debt, and the debtor would have a right in the suit to have the security realized. So far as *Sakihuddin Saha v. Sonallah Sarkar* (2), *Perumal Ammal v. Perumal Naicker* (3) and *Elumalai Chetty v. Balakrishna Mudaliar* (4), which were relied on by the High Court, decide contrary to the appellants' contention, it is submitted that they were erroneous.

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(1) (1920) I. L. R. 43 Mad. 660;
L. R. 47 I. A. 188.

(3) (1920) I. L. R. 44 Mad. 196.

(2) (1918) 22 C. W. N. 641.

(4) (1921) I. L. R. 44 Mad. 965.

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Dunne K. C. (with him *Pringle*) for the respondents. The debentures were documents which were required to be registered by section 17, subsection (1) (b) of the Registration Act. The operation of the debentures cannot, for this purpose, be split up, as is suggested. Having regard to the construction of the agreement in *Vyavan Chetti's* case (1), the decision does not assist the appellants. If one of the results of a document is that a charge is created upon immovable property, the document is not admissible in evidence under section 49, even if the suit is not to enforce the charge in question: *Dayal Singh v. Indar Singh* (2). The fact that that judgment was based upon a mistaken view that the Transfer of Property Act applied, and that Act II of 1927 retrospectively deprived it of its effect, does not affect the principle so laid down. The definition of "actionable claim" in Act II of 1900, section 2, by excluding a debt secured upon immovable property, is fatal to the appellants' present claim. Even if, consistently with that definition, a debt can be transferred apart from the immovable security for it, the debentures cannot be construed as having that effect. Order XXXIV, rule 14, shows that the policy of the Indian legislature is against the transfer of a mortgage debt apart from the security for it. The decisions of the Calcutta and Madras High Courts referred to were correct.

W. A. Greene *K. C.* replied.

The judgment of their Lordships was delivered by LORD ATKIN. This is an appeal from an order of the High Court of Judicature in Bengal affirming an order of the Court made in its original civil jurisdiction on an application for directions made by the liquidators of the Bengal National Bank, Ltd., the respondents in this appeal.

(1) (1920) 1. L. R. 43 Mad. 660; (2) (1926) L. R. 53 I. A. 214.
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The respondent bank in 1907 was incorporated and registered under the Indian Companies Act, 1882. On or before 4th May, 1923, the respondent bank had borrowed from the Imperial Bank of India, the appellant, hereinafter called the Imperial Bank, the sum of ten lakhs with interest, and, on 4th May, executed and delivered to the Imperial Bank a debenture creating a floating charge on the whole undertaking, properties, assets and interests present and future of the respondent bank as security for the loan. On 1st August, 1923, a similar debenture was executed and delivered to the Imperial Bank, creating a similar floating charge as security for a further loan of ten lakhs with interest. Both documents were duly registered pursuant to section 109 of the Companies Act, 1913. Neither document was registered under the Registration Act, 1908. In both documents, the charge was to become fixed, amongst other events, on the respondent bank suspending payment. On 28th April, 1927, that event happened. On the same date, the Imperial Bank, exercising a power given them by the debenture of 1st August, 1923, appointed three gentlemen as receivers under the debenture. On 20th May, 1927, a petition was presented for winding up the respondent bank, and, on 2nd August, a winding up order was made. On 26th May, the Imperial Bank commenced a debenture holders' action, and, on 1st June, the three receivers appointed by them were appointed receivers by the Court. On 9th August, two of the receivers, together with a third gentleman, were appointed official liquidators. On 10th February, 1928, the official liquidators presented a petition to the Court asking for directions on various matters.

The question, which is the subject matter of this appeal, involves a considerable sum of money and is of great importance to persons lending money to companies, and especially to banks. It appears that the respondent bank in the ordinary course of

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its business lent money to customers on overdraft account, on the security of title deeds deposited by the customers, in respect of which loans, at the date of the suspension of payment, sums remained due to the bank, who continued to hold the security. The question is whether the two debentures held by the Imperial Bank give them any and what interest in the amounts due to the respondent bank from such customers and in the property comprised in the title deeds.

The Imperial Bank set up the express charge over the whole of the assets of the respondent bank. The liquidators contend that the debentures, so far as they seek to charge the debts secured on deposit of title deeds, come within section 17 of the Registration Act, which requires registration of all non-testamentary instruments which “purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest whether vested or contingent of the value of one hundred rupees and upwards, to or in immovable property”; and not being registered are covered by section 49 of the same Act, which provides that no document required by section 17 to be registered and, in fact, unregistered shall affect any immovable property comprised therein or be received as evidence of any transaction affecting such property. The result of non-registration is, as they contend, not only to deprive the Imperial Bank of any right to the property comprised in the title deeds, but also of any right over the sums so secured. This view has found favour with the High Court on appeal, and it is this decision which their Lordships have now to consider.

It is desirable to mention two incidental matters. In the course of its business, the respondent bank had, in some cases, sued its customers on the overdrafts, obtained money decrees against them, procured the property comprised in the deposited title deeds to be sold in execution, and had itself

bought the property in the execution sale. Such property obviously became part of the immovable property of the respondent bank. In some other cases, the respondent bank had redeposited some of the title deeds with the Imperial Bank as security for loans. No question arises as to these, as it was eventually conceded by the liquidators that such transactions were protected by section 59 of the Transfer of Property Act, 1882.

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The question, raised by this application for directions as to the rights of the Imperial Bank, came, in the first instance, on the 9th March, 1928, before Costello J., who directed it to stand over until after the determination of the debenture holders' action above referred to. On the 26th March, 1928, the debenture holders' action came on for decision before Costello J., who on admission made on behalf of the Imperial Bank, made a decree which, so far as is material, is as follows: "The plaintiff bank, by its advocate admitting that by reason of the fact that the two debentures in the plaint in this suit mentioned have not been registered in accordance with the provisions of the Indian Registration Act, 1908, such debentures do not operate to affect any immovable property of the defendant bank, it is declared that the said debentures constitute charges upon all the undertaking, property and assets (including uncalled capital) of the defendant bank other than the immovable property of the defendant bank." This decree, from which no appeal has been brought, operates, in the opinion of their Lordships, to restrict considerably the points that remained open for argument by the Imperial Bank. Counsel desired to address to the Board arguments to the effect that the Registration Act did not apply to a floating charge for various reasons, as, for example, that it was impossible to comply with the provisions requiring particulars of the specific property: they also were prepared to contend that provisions in the Indian Companies Act for the

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registration of charges took the place of the provisions in the Indian Registration Act so far as they affected dispositions by companies. Their Lordships, in the course of the hearing, felt bound to intimate that, in their view, in this case, such contentions were no longer open. The decree is inconsistent with any such arguments: and in their Lordships' view, any right, title or interest in the properties comprised in the title deeds in question which the Imperial Bank claim by their debentures must be covered by the phrase "immovable property" used in the admission and the decree.

As a result, it follows that the Imperial Bank, by their debentures, acquired no right, title or interest in the immovable property comprised in the title deeds. In other words, the title deeds are not available to them as security for any of the debts which the deeds were deposited to secure. They cannot, therefore, control such securities, or the disposition of them, or take steps to enforce them either in their own name or in the name of the respondent bank.

Are they, however, left without any right or interest in the debts which the title deeds secure? The High Court, on appeal, has answered this question in the affirmative. Their Lordships are of opinion that this decision does not give effect to the rights of the parties and cannot be supported.

The debentures were intended to create a charge over the whole of the assets of the respondent bank; a floating charge until the occurrence of the stipulated events; a fixed charge when any of these events occurred. It is unnecessary to discuss how such a floating charge obtains legal validity in India. It is sufficient, in this case, to say that its validity over assets other than immovable property is not disputed, and has been expressly established by the decree in the debenture holders' action referred to above. Inquiry, therefore, has to be made as to what were the assets of the respondent bank other

than immovable property at the time when the charge became fixed. It seems to their Lordships obvious and beyond question that the principal assets of this bank, as of any bank, are the debts due to the bank from customers either for advances, whether on overdraft or loan account, or for any other consideration, such as guarantees, *etc.* The debts may be secured either on immovable property or on merchandise: they may be wholly secured or partly secured: the security may have been given when the debt was created or later; but, in any case, the debts exist as movable property: and do not, if secured, become identified with the security or transformed into land in the one case or merchandise in the other. The separation between debt and security is well established; the creditor is entitled to take a judgment for the debt without having recourse to his security. There would, therefore, appear to be no reason in principle why a creditor should not be able to charge his movable assets, the debts due to him, —even if he be unsuccessful by reason of statutory restrictions in transferring the security.

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The difficulty felt by Rankin C. J., which led him, contrary to his own wishes, to decide against the charge on the debts, was created by the terms of the Transfer of Property Act, 1882, as amended by the Act of 1900. By the amending Act, an actionable claim was defined as “a claim to any debt other than “a debt secured by mortgage of immovable property “or by hypothecation or pledge of movable property,” and sections were substituted for corresponding sections in the Act of 1882 dealing with the transfer of actionable claims. It appeared to the Chief Justice that, inasmuch as a secured debt is not within the definition of actionable claim, the debt without the security could not be made the subject of transfer at all. But this seems to be creating disabilities which are not expressed in the Act, and, indeed, are inconsistent with it, for, by section 6 of the Act of

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1882, "Property of any kind may be transferred "except as otherwise provided by this Act or by any "other law for the time being in force." It appears to have escaped notice that the definition of "actionable claim" also excludes debts secured by hypothecation or pledge of movable property; and it would appear very remarkable if, in India, merchants are unable to secure credit by disposing of their available book debts unless at the same time they re-hypothecate or repledge the merchandise which they may happen to hold. The effect of the amendment is to restrict the statutory rights on transfer such as the right to sue in the transferees' name, *etc.*, to such transfers as are transfers of actionable claims as defined. There appears to be no difficulty in a transfer of a debt without the security: the original debtor can always redeem: the relations between him and his original creditor are not altered: indeed, in the present case, it would appear that the Imperial Bank can only enforce the debt in the name of the respondent bank which, no doubt, the latter bank must permit. The transferee takes no further interest than the transferor was able to give him. The rights of the parties are further declared by the amended section 134 of the Transfer of Property Act, which would appear to apply to their case.

The result is that, while the Imperial Bank have no right or interest in the immovable property of the respondent bank, including the immovable property over which the respondent bank hold security, the Imperial Bank have a charge over the debts due to the respondent bank, whether secured or not, and are entitled to the benefit of all sums received in reduction of the debts, whether from the realisation of securities or otherwise.

Their Lordships are, therefore, of opinion that the appeal should be allowed, and the order of the appellate court, dated the 18th March, 1930, be set aside. The order of Mr. Justice Buckland, dated the 26th August, 1929, should be varied by adding before

the first "It is ordered" the following declaration:—
 "It is ordered and declared that by virtue of its
 "debentures the Imperial Bank of India is entitled
 "to all sums received or to be received subsequently
 "to the 28th April, 1927, by the receivers or the
 "liquidators of the Bengal National Bank, Ltd., in
 "or towards satisfaction of debts owing to that bank
 "upon the security of property movable or immovable,
 "and any interest on such debts, whether such sums
 "were or shall be received by way of repayment by
 "the customer or payment by a guarantor or out of
 "proceeds of sale of the security or otherwise; and,
 "subject thereto,"

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The costs of the parties in the appeal below should be costs in the application. The costs of both parties of the appeal to His Majesty in Council should be taxed; the costs of the Imperial Bank as so taxed being added to its security: the costs as so taxed of the respondent bank being included in the costs, charges and expenses of its liquidation.

Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellants: *Morgan, Price, Marley & Rugg.*

Solicitors for respondents: *Sanderson Lee & Co.*

A. M. T.