ORIGINAL CIVIL.

Before Ameer Ali J.

1935

Mar. 13, 14.

MANMOHAN MUKHERJI

v.

KESRICHAND GULABCHAND.*

Pledge—Inoperative pledge of moveables, if effective as mortgage—"Hypothecation"—Mortgage of moveables without possession—Title of mortgagee against subsequent pledgee and attaching creditor.

There is no such thing as a pledge of moveables without possession. Before possession of the moveables are taken, there is only an agreement to pledge.

A transaction regarding moveable properties, which cannot operate as a pledge on account of non-delivery of possession of the same to the pledgee, does not operate as an effective mortgage of the same, whether the language of the document embodying the transaction be of intended pledge, or be couched in the usual phraseology of a mortgage, or whether the word used be "hypothecation."

A mortgage of moveable properties without possession is deferred to a subsequent pledge of the same, and also to a subsequent *bona fide* purchaser for value and to the assignee in insolvency. The same principle applies to the case of holders of trust receipts.

The Co-operative Hindusthan Bank, Ltd. v. *Surendranath De* (1) and *Chartered Bank of India, Australia and China* v. *Imperial Bank of India* (2) referred to.

The judgment-creditor of a mortgagor of moveables gets no title to the same as against the mortgagee without possession by the filing of his application for attachment of the goods; he has merely a right to move the court to take possession on his behalf and ultimately to bring the goods to sale. If the mortgagee of the goods takes possession before the exercise of the right to take possession of the same by the judgment-creditor, the latter cannot get possession.

Deans v. *Richardson* (3) not followed.

ORIGINAL SUIT.

The material facts and arguments appear from the judgment.

S. K. Basu for the plaintiff.

F. R. Surita and *B. Bose* for the defendants.

*Original Suit No. 1124 of 1933.

(1) (1931) I.L.R. 59 Calc. 667. (2) (1932) I.L.R. 60 Calc. 262.

(3) (1871) 3 N. W. P. H. C. R. 54.

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AMEER ALI J. This suit turns upon a transaction of 1931. On the 2nd September, 1931, the defendants attached the furniture, in fact, all the moveable property of Messrs. H. Rolfe & Company at 5/O, Old Court House Street, in Calcutta. The business, in fact, was run by one R. S. Ashcroft, who was the sole proprietor, at any rate, according to his evidence. The defendants obtained a decree against Mr. Ashcroft for a sum of Rs. 1,400. On the 2nd September, the plaintiff in this suit, through his solicitors, wrote, claiming these moveables as having been validly pledged to him on the 3rd June, 1931. The goods remained under attachment and were only sold on the 8th March, 1934, for the small sum of Rs. 400 odd. The goods, as on the 2nd September, 1931, are valued by the plaintiff at Rs. 4,000.

The plaintiff filed certain claim proceedings on the basis of his having been in possession on the date of the attachment and his claim was dismissed. It was after the claim-matter had been disposed of that this suit was filed. The point has been taken by the defendants that, as in that claim matter the question of possession was decided adversely to the plaintiff, in these proceedings on the question of possession he is bound. On this point I am in the plaintiff's favour. The questions, therefore, in this suit for me to decide are, first, whether the transaction of 3rd June, 1931, was a genuine transaction. Secondly, whether the plaintiff, on the 2nd September, 1931, was in possession of the goods. If so, he will succeed. Two further questions of law arise: (i) Assuming the transaction to be *bonâ fide*, whether, as "pledgee" without possession, he will be entitled to succeed, and alternatively, (ii) whether the transaction can be regarded as a mortgage without possession and upon that basis the plaintiff is entitled to succeed?

It is said that the plaintiff came to finance Mr. Ashcroft sometime about December, 1930. The defendants had been his previous financier. There was a written document containing the terms of the

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agreement between the plaintiff and Mr. Ashcroft, but the plaintiff has not been able to find it. The exact terms are, in my opinion, not very important.

It appears from the evidence that he was connected with this firm in this sense, that he had something to do with it and being so connected that he attended from time to time at the place of business. I also think that he did advance money to some extent, and I am not prepared to come to the conclusion that the four earlier promissory notes (Ex. E) have been manufactured for the purpose of this case. The evidence is that he was to receive so much interest on the advances and a percentage on the amount of the bills recovered. On the other hand, the amounts of these four promissory notes are very material.

The transaction of the 3rd June, 1931, consists of a promissory note in the same form and a document which reads as follows, attached to a signed list of furniture :—

> I hypothecate all the furniture and fitting of the firm and of myself the description of which is given attached to Mr. M. M. Mukherji, *etc.*, in consideration of a promissory note for the sum of Rs. 1,854. The furniture and fitting are in his possession.

It is said, on behalf of the plaintiffs, that, when the Sheriff's officer came to attach on the 2nd September, 1931, protest was made to him on the ground that the furniture belonged to Mr. Mukherji both by Mr. Ashcroft and then by the plaintiff himself. On this point, the *gomastâ* of the defendant firm has given evidence, and the Sheriff's officer Mr. Roseboom. With regard to the evidence of the *gomastâ* there were discrepancies between his evidence and that of Mr. Roseboom. I do not think that he was intentionally departing from the truth, but, at the same time, on this point, it would be unreasonable to rely upon his evidence, more particularly, as he admits he cannot understand English. Mr. Roseboom, whose evidence I accept, for the most part cannot remember. He does,

however, remember there was mention of a claim in respect of two fans. He does not remember the other and bigger claim; somewhat curious, but, at the same time, not enough for me to rely upon.

The question turns on the view I take of this transaction of the 3rd June, 1931, and it must be, as I have said in similar cases, very largely a matter of impression. So far as witnesses are concerned there is no question of evidence forthcoming on this transaction on behalf of the defendants. The onus is upon the plaintiff, and I have to assess the evidence carefully. So far as the two witnesses are concerned, the plaintiff and Mr. Ashcroft, I conceive it my duty to give my opinion for what it is worth. The plaintiff, even allowing for a certain amount of assertiveness which may be attributed to the fact that he was formerly a school master, was not a very good witness. But again I am not going to rely upon that alone. His manner may be entirely due to his nervousness, to the fact that, not being a rich man, he has become involved in very disastrous litigation. Mr. Ashcroft, on the other hand, was a good witness. At the same time very clever man and a witness about whom I have my doubts. I do not think that he is at arms length now from the plaintiff, an impression he sought to give.

My decision is based mainly on my inference from the documents, *i.e.*, those that have been produced, namely, the two pass-books and the cheque book, and from the non-production of the books. Having regard to the condition of the plaintiff's two accounts, having regard to the amounts of the previous promissory notes and to the circumstances I have mentioned, I find it very difficult to believe that this transaction was in the ordinary way of business. Whether it was brought into being after the 2nd September, 1931, I am unable to say, but I feel bound to find that it was not a genuine loan, and I think it was to protect Ashcroft from the impending execution. That really is enough to decide the case.

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On the question of possession, again, I am unable to accept the contention of the plaintiff that he was in possession as pledgee on the 2nd September. I do not feel myself bound by anything that happened in the claim proceedings, but I do think the mere fact that the plaintiff went and sat in the office during the day and occupied one room does not mean, as regards the world, that he was in possession of the furniture. For the purposes of this finding I shall assume that the debtor said to the plaintiff borrower "take possession". That, in my opinion, makes no difference. The question is, had he actual control either physical or constructive. I myself think that, on the facts, he had neither.

The suit will, therefore, be dismissed with costs.

There remains the question of law which I decide on the footing that this transaction of 3rd June, 1931, was genuine, but that, on the date of the attachment, the plaintiff was not in possession. I give my view because I consider the condition of our law on this point to be unsatisfactory, not only from a legal point of view as Sir Rash Behary Ghose pointed out, but also from the public's point of view. It is a temptation to traders in financial difficulties to enter into this sort of transaction with resulting claim proceedings and suits involving enormous expense and the result of which must be largely a matter of chance. A most undesirable state of things, not fair to anyone. Sir Rash Behary Ghose, in the first edition of his book, written somewhere in the eighties, "trusted that some day the "Indian legislature would have leisure to take the ques- "tion in hand". The Indian legislature has never had such a leisure.

I have at one time or another considered the law in detail. I have not had the time to do so on the present occasion. I will, therefore, merely summarise my views.

I. The use of the term "hypothecation" should be abandoned. It is an equivocal and therefore dangerous word. For instance, at page 115 of Ghose

on Mortgage (the passage in which this matter as a whole is dealt with). Sir Rash Behary Ghose refers to all securities on moveables as hypothecations, using the word merely to distinguish security on moveables from security on land.

On the other hand, in the reported cases (for instance in the case of The *Co-operative Hindusthan Bank, Ltd.* v. *Surendranath De* (1) the learned Judges used the word "hypothecation" to indicate that the security on moveables has a different effect or is something less than a mortgage. The passage reads:—

> Strictly speaking a simple mortgage of moveables with a power of sale, is a mere hypothecation with the stipulation that in the event of the debt not being paid.....the mortgaged properties may be realised by sale.

II. *Forms of securities on moveables*: (a) You can have a pledge which cannot exist without possession. You may have an agreement to pledge and when in pursuance of that agreement the lender takes possession it becomes a pledge. Before possession is taken there is nothing more than agreement. Technically speaking there is no such a thing as a pledge without possession.

(b) Can a transaction which cannot operate as a pledge because no possession has been taken operate as an effective mortgage of moveables?

The authorities say Yes. See the cases cited in Ghose on Mortgage, page 115.

I myself think not, whether the language be of intended pledge, or the word used be "hypothecation", or the document be couched in the usual phraseology of a mortgage.

III. *Effect of mortgage of moveables without possession.*

(a) According to the latest authorities a mortgagee under such a mortgage without possession will be deferred to a subsequent pledgee to a *bonâ fide* purchaser

(1) (1931) I. L. R. 59 Calc. 667, 678.

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for value [The *Co-operative Hindusthan Bank, Ltd.* v. *Surendranath De* (1)] and to the assignee in insolvency. On the same principle and in the same sense are decided the cases determining the position of holders of trust receipts [*Chartered Bank of India, Australia and China* v. *Imperial Bank of India* (2)].

With these decisions I respectfully agree, subject to the opinion expressed in II (b).

(b) On the other hand, as against an attaching creditor such a mortgagee will still be entitled to the security. *Deans* v. *Richardson* (3) does not appear to have been dissented from.

I am unable to agree. I concede that the attaching creditor gets no title in the goods. He has merely a right to move the Court on his behalf to take possession and ultimately bring the goods to sale. But he has that right. Until he exercises it, until the actual attachment the person claiming the goods as security has the right to take possession. If he has done so, the attaching creditor cannot get possession. If he has not, the attaching creditor can. That is my view, whatever the form of the document creating the security.

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A. K. D.

(1) (1931) I. L. R. 59 Calc. 667. (2) (1932) I. L. R. 60 Calc. 262.
(3) (1871) 3 N. W. P. H. C. R. 54.