APPELLATE CIVIL.

1935

Jan. 24, 28, 29 ; *Mar.* 6.

Before D. N. Mitter and Patterson JJ.

KALIDAS CHANDRA

v.

JUGALKISHORE DATTA*

Registration—Mortgage by deposit of title-deeds —Document restating terms of verbal agreement, if requires registration—Legal representative—Indian Registration Act (XVI of 1908), s. 17—Code of Civil Procedure (Act V of 1908), O. XXII, r. 4.

Pursuant to a verbal agreement to create a charge on certain immoveable property, the defendant borrowed some money on a promissory note and deposited the title-deeds of such property. The terms of the agreement were restated in a letter which recorded the fact of the deposit of title-deeds.

Held that the letter did not constitute the bargain and did not require registration under section 17 of the Indian Registration Act.

Obla Sundaracharlar v. *Narayana Ayyar* (1) followed.

Subramonian v. *Lutchman* (2) distinguished.

Where the defendant is sued as executor, on his death the estate of the testator devolves on the residuary legatee and under Order XXII, rule 4 (3) of the Code of Civil Procedure, the suit abates unless he is brought on record within the period of limitation.

Sri Sri Keshab Rai Jieu Thakur v. *Jyoti Prosad Sing Deo* (3) distinguished.

APPEAL by the plaintiff.

The facts of the case and the arguments in the appeal appear sufficiently from the judgment.

S. N. Banerjee, Chandrashekhar Sen and *K. Bose* for the appellant.

Gopendranath Das, Amarnath Ray, Dheerendranath Sarkar and *Beereshwar Bagchi* for the respondents.

Cur. adv. vult.

*Appeal from Original Decree, No. 70 of 1930, against the decree of Upendrachandra Ghosh, Second Subordinate Judge of 24-*Parganâs*, dated Jan. 18, 1930.

(1) (1931) I. L. R. 54 Mad. 257 ; L. R. 58 I. A. 68.

(2) (1922) I. L. R. 50 Calc. 338 ; L. R. 50 I. A. 77.

(3) (1932) 36 C. W. N. 816.

MITTER J. The suit in which this appeal arises was brought by the plaintiff to enforce a mortgage of certain property by deposit of title deeds. His suit has been dismissed by the Subordinate Judge. Hence the present appeal.

In order to understand the contentions raised by this appeal it is necessary to state a few salient facts. On the 10th April, 1915, Neelmani Datta executed a will by which he appointed his son Jugalkishore as executor and his second wife, Atimunjuri, as executrix and after making certain provisions for his grandsons by a predeceased son and his wife and daughter bequeathed his residuary estate, both moveable and immoveable, to his five sons Jugalkishore, Kartikchandra, Manmathanath, Kuberchandra and Naderchand absolutely in equal shares. On the 5th January, 1916, Neelmani died. For the purpose of meeting the expenses of taking probate, Jugal took a loan of Rs. 8,000 on a promissory note from the plaintiff and deposited the title deed of 61-C, Linton Street on 1st August, 1919, and on the same day the said Jugalkishore gave a letter to the plaintiff in which he mentioned the fact of the loan and the deposit. The sum borrowed as has been stated was Rs. 8,000 and the defendant promised to pay interest at the rate of $7\frac{1}{2}$ annas per cent. per annum. On the 1st October, 1919, probate of the will was taken by Jugalkishore the executor. In 1923, the plaintiff instituted a suit on the Original Side of the High Court to enforce the mortgage and he got a decree, when he went to execute the said decree it was held that Linton Street—the property now in suit was outside the jurisdiction of the Original Side and the suit had consequently to be withdrawn. The present suit was then instituted. On the 8th June, the present suit was instituted by the plaintiff in which he asked (*i*) for a mortgage decree for Rs. 13,500, (*ii*) that time may be fixed for the payment of the decretal amount, (*iii*) that a decree may be passed for realisation of the plaintiff's claim in case the

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decretal amount is not paid within the time fixed. On the 6th August, Jugalkishore put in his written defence. He contended *inter alia* that he has ceased to be an executor and that his brothers should be made parties, that the deposit if made was wholly insufficient to create an equitable mortgage. That he never borrowed any money, never made the deposit, that he had no knowledge of English and he most emphatically denied having signed any letter embodying the terms of the alleged deposit of title deeds and said that no valid mortgage was effected as there was no registration of the letter. The trial court negatived all the defences except the defence of non-registration of the letter Ex. 1. In his view, the letter Ex. 1, dated 1st August, 1919 (see page 41, part II) constituted the bargain between the parties and, therefore, required registration. It is to be noticed that the defendant denies that he executed the document at all. But, on the evidence of the plaintiff, the Subordinate Judge came to the conclusion that the letter constituted the bargain and as it was not registered he dismissed plaintiff's suit. In appeal it has been contended that the letter, dated 1st August, 1919 (see page 41, part II), purports to be a record of something that had already taken place and did not constitute the bargain, and, therefore, it did not require registration. The plaintiff and the solicitor's clerk, who were examined twelve years after the transaction, gave evidence in this case. Plaintiff, who is aged about 71 years, said—

> I lent money on collateral security. It took place in the office of Priyanath Sen, attorney, in Old Post Office Street, Calcutta. One title deed of No. 72, Linton Street, premises was handed to me as security for the money .....Defendant executed a hand-note for the money lent in my presence .....I was aksed to go with the money and the defendant promised to go there with the security. Defendant also wrote a letter in favour for collateral security.

See page 18. Again at page 19 witness says—

> *The hand-note was signed after I had paid the money. That only was done at the time*.....I was told that the document was sent to me after it was properly written (see page 19). *As the collateral security was not completed I had to come away without the hand-note.* I got the deed and the hand-note and letter 10 or 12 days after.

and in re-examination the witness said—

The conveyance was taken to the attorney's office at the time of the transaction.

From the passages in italics in plaintiff's evidence, the learned Subordinate Judge below draws the conclusion that it is the letter Ex. 1 that constituted the bargain, and he supports this conclusion by the evidence of Shashi (witness 3 for plaintiff), the solicitor's clerk, who says at page 21 (top)—

The money for the hand-note was paid after the hand-note was *executed and the letter signed by Jugal.*

In re-examination the witness says—

The writing and signing the letter by the defendant completed the security and so the money was paid after the letter was signed.

This witness, aged about 69, was deposing nearly twelve years after the transaction in question and the re-examination shows that his statement that the money was paid after the letter was written is coloured by his view that the writing and signing the letter completed the collateral security. Having regard to the long lapse of time between the transaction and the time when depositions of plaintiff and his witness were given the best evidence would be what is contained in the letter Ex. 1 (which is a copy of the original letter) which must be taken to record a correct statement of what was happening at the time. The letter, dated 1st August, 1919, runs as follows:—

Dear Sir,

I have this day executed a promissory note for the sum of Rs. 8,000 with interest at the rate of ten annas per month in your favour and *I also deposited* with you title deeds and documents in respect of 72, Linton Street, Calcutta, as collateral security for the due repayment of the said sum of Rs. 8,000 with interest.

Yours faithfully,

Jugalkishore Datta.

The past tense "*I also deposited*" shows beyond question that the title deeds had been deposited when the hand-note was executed and this letter merely records a transaction which had happened already.

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The hand-note contained the terms of the bargain and it was accompanied by a deposit of title deeds. This was sufficient under the authorities to constitute an equitable mortgage. As appears from plaintiff's evidence that the agreement to lend money on the security of immoveable property had already been reached, for plaintiff says at pages 18 and 26 :—

> The first talk of borrowing took place in my house. I agreed to lend the money. It was arranged that the transaction will take place in the office of P. N. Sen, Solicitor. I was asked to go there with the money and the defendant promised to go there with the security document.

There has been the verbal agreement before and even if the evidence of Shashi represents the truth that the money was not paid till the letter Ex. 1 was signed, the letter cannot be regarded as constituting the bargain. See the decision of their Lordships of the Judicial Committee in *Obla Sundarachariar* v. *Narayana Ayyar* (1), where, in circumstances somewhat similar to the present, it was held that the memorandum did not require registration. There the facts were :—

The plaintiff verbally agreed at Madras to make a further advance to the defendants, making Rs. 60,000 in all, upon the deposit of certain documents of title. The defendants' agent signed and handed to the plaintiff a memorandum stating "As agreed upon in person I have delivered to you "the undermentioned documents as security"—a list of the documents following, also a promissory note for Rs. 60,000. After examination of the documents, the agreed amount was handed over. There it was held that the memorandum was not a document which required registration, even if the agreed advance was conditional upon it being given; and that there being no written agreement, the memorandum, as well as oral evidence, was admissible in evidence to prove the intent to create a security by deposit of the documents named.

(1) (1931) I. L. R. 54 Mad. 257 (263) ; L. R. 58 I. A. 68 (73).

At page 73 their Lordships observed :—

Even if it was a condition of the advance that the memorandum was to be given, the fact that the memorandum was prepared, signed and handed over to the mortgagee before the advance of the balance of the money to be secured by the deposit could not alter the nature and meaning of the document. It was and remained a list of the documents deposited and nothing more. It did not embody the terms of the agreement between the parties. Upon this view of the matter, apart from authority, it would, in their Lordships' opinion be impossible to hold that the document purported or operated to create or declare any right, title or interest in the property, and required to be registered under section 17 of the Registration Act.

The documents were not handed over along with letter, Ex. 1, but had already been handed over as the letter itself shows. The case, therefore, is not hit by the decision of their Lordships in *Subramonian* v. *Lutchman* (1), where the document stated "We "hand you herewith title deeds .....This "please hold as security", and their Lordships held that the memorandum constituted a bargain between the parties.

Mr. Beereshwar Bagchi, appearing for the brothers of Jugal, who were subsequently added as parties to the appeal, in circumstances to be detailed hereafter, has contended that as the deposit of title deeds was accompanied with the letter, Ex. 1, the terms of the letter must be referred to in order to ascertain the exact nature of things and would constitute the real bargain between the parties. In support of this position, he has relied on the decision of the House of Lords in *Shaw* v. *Foster* (2). Lord Cairns in his speech before the House of Lords said this :—

A deposit of title deeds as security for a debt, will, without more, create in Equity a charge upon the property ; but where it is accompained by a written document, the terms of that document must be referred to in order to ascertain the exact nature of the 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 document by which alone you must be governed.

(1) (1922) I. L. R. 50 Calc. 338 ; L. R. 50 I. A. 77.

(2) (1872) L. R. 5 H. L. 321.

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The document in that case is set forth in the 2nd paragraph of page 340 and it stated:—

> In consideration of the premises I hereby charge my free-hold estate..... with the due payment of £50,000 represented by my said acceptances.

It is clear that in this case the document created the charge. In the present case the charge had been created by the deposit of title deeds and the execution of the hand-note (Ex. 2), page 41, in pursuance of a previous verbal agreement to create such a security by deposit of title deeds and the letter, Ex. 1, merely recited the fact of the creation of an equitable mortgage. Ex. 2 contained all the terms of the loan, the interest payable on it. Those terms were restated in Ex. 1. We disagree with the Subordinate Judge and hold that a valid mortgage was created.

Another chapter of events will have now to be narrated. On the 17th of March, 1930, the appeal was filed against Jugalkishore in this Court. On the 13th of July, 1932, Jugalkishore died. On the 26th of July, 1932, an application was made by the plaintiff before the Registrar, Appellate Side, praying for substitution of Nagendranath in place of his deceased father Jugalkishore. On the 28th of July, 1932, the order for substitution was made. At the time of the hearing of the appeal, two years later, in 1934, it was discovered that, on Jugalkishore's death, the estate of Neelmani vested in the four brothers of Jugalkishore and his son Nagendranath. A rule was issued on the brothers of Jugalkishore to show cause why they should not be added as parties to the appeal. The Rule was heard and they were added as parties to the appeal and the question was left open as to whether, in the circumstances, the appeal had not abated by reason of their not being brought on the record of the appeal within the period of limitation provided for by law. The application, if Order XXII, rules 3 and 4 of the Code of Civil Procedure Code apply, must be made within 90 days from the date of the death of the deceased respondent. See Limitation Act, 1908, Schedule I, Article 177. If

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this Article applies, there can be no question that the appeal had abated against the four brothers of Jugalkishore, for the application was not made till more than two years had expired from the death of Jugalkishore. For the appellant, however, it has been contended by Mr. S. N. Banerjee, counsel, that Order XXII, rules 2, 3 and 4 of the Civil Procedure Code do not apply, where a suit is brought against a person in his representative character and we were referred to a decision of this Court in the case of *Sri Sri Keshab Rai Jieu Thakur* v. *Jyoti Prosad Sing Deo* (1), to which I was a party. That was a case where the suit was instituted by the deity through the *mohant* and *shebâit* Raja Gopal Acharjya. There the deity was really the appellant and it was said that on the death of the *shebâit* there was really a devolution of interest on the succeeding *shebâit* and, in those circumstances, it was said that Order XXII, rules 2, 3 and 4 related to cases of devolution of interest on the death of a plaintiff or defendant when such plaintiff or defendant was suing or being sued respectively in his personal capacity. For the respondent it is said that a suit by a *shebâit* on behalf of an idol must be distinguished from a suit brought by the executor who is himself the plaintiff, and it is argued that, having regard to the definition of the word "legal representative", in section 2(*11*) of the Civil Procedure Code, the cases of suits by executors are not excluded from the operation of Order XXII, rules 2, 3 and 4. The material part of section 2, clause (*11*) is as follows :—

> The "legal representative" means a person who in law represents the estate of a deceased person, and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of a party so suing or sued.

In the case of an idol, who is regarded as a perpetual infant, there must be some one to act as the earthly representative of the deity and, on the death of such an earthly representative, the idol has to be

(1) (1932) 36 C. W. N. 816.

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represented by some successor of the *shebâit* according to the deed of endowment or, if there is no provision in such a deed, then by the heirs of the founder of the endowment. The words "legal representative" occur in Order XXII, rule 4 and not in Order XXII, rule 10. Where the defendant is sued as executor, on his death, the estate of the testator devolves on the residuary legatee and Neelmani's estate devolved on the four brothers of Jugalkishore and Jugal's son on Jugal's death. The appeal has, accordingly, abated as against the four sons of Neelmani. The result is that we allow the appeal to this extent, namely, plaintiff will have the usual mortgage decree as against Jugal's son, Nagendranath. If the amount due to the plaintiff is not paid within three months from this date, then one-fifth share of Jugal in his 61-C, Linton Street, will be sold. The amount lent will carry interest at the rate of $7\frac{1}{2}$ per cent. per annum up to the date of grace and thereafter the interest will run at the rate of 6 per cent. per annum. The plaintiff is entitled to get his full cost in the court below and one-fifth of his cost in this appeal against Nagendranath. As to whether the right of the plaintiff to a personal decree against Nagendranath under Order XXXIV, rule 6 of the Code is barred by limitation is a question that is left open and will be determined when an application is made by plaintiff for such a decree.

PATTERSON J. I agree.

Decree varied.

G.K.D.