

APPELLATE CIVIL.

Before *S. K. Ghose and Patterson J.J.*

FATIMA BAI

v.

OFFICIAL TRUSTEE OF BENGAL.

1937

June 17, 21, 22,
24.

Registration—Mortgage by deposit of title-deeds—Document relating to such mortgage, when should be registered—Indian Registration Act (XVI of 1908), s. 17.

When upon a mortgage by deposit of title-deeds a document is drawn up relating to the transaction between the parties, such document shall be registered under s. 17 of the Indian Registration Act if it creates the mortgage or the mortgage is not complete without the writing; e.g., if it embodies the terms of the loan and is contemporaneous with the transaction accompanying the delivery of title-deeds and containing the calculation of the amount of interest.

Kedarnath Dutt v. Shamloll Khetry (1); Obla Sundarachariar v. Narayana Ayyar (2); Miller v. Madho Das (3); C. B. Swami Chetty v. S. T. Ethirajulu Nayudu (4); Subramonian v. Lutchunan (5) and Bhairab Chandra Bose v. Anath Nuth De (6) referred to.

APPEAL FROM ORIGINAL DECREE preferred by some of the defendants.

The facts of the case and arguments in the appeal are sufficiently stated in the judgment.

Atul Chandra Gupta and Pankaj Kumar Mukherji for the appellants.

S. M. Bose, Standing Counsel, Shambhu Nath Banerji and Phaneendra Mohan Sanyal for the respondents.

Cur. adv. vult.

*Appeal from Original Decree, No. 252 of 1935, against the decree of Kshirodeshwar Banerji, Subordinate Judge of Burdwan at Asansol, dated July 31, 1935.

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

(4) (1916) I. L. R. 40 Mad. 547.

(2) (1931) I. L. R. 54 Mad. 257; (5) (1922) I. L. R. 50 Cal. 338;
L. R. 58 I. A. 68. L. R. 50 I. A. 77.

(3) (1896) I. L. R. 19 All. 76;
L. R. 23 I. A. 106.

(6) (1920) 24 C. W. N. 599.

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S. K. GHOSE J. This is an appeal by the heirs of defendant No. 1. The facts which have given rise to this litigation may be shortly stated as follows:— P. S. Mehenti, who is defendant No. 2, took lease of Khandra Colliery, which is the mortgaged property in suit, on September 2, 1919. On March 16, 1920, he gave an equitable mortgage for a sum of Rs. 1,25,000 to one Nursing Sahai Madan Gopal. On September 21, 1921, Mehenti executed a deed of mortgage for a sum of Rs. 65,000 in favour of Khar-sedji Limji, defendant No. 3. The latter executed a deed of conveyance in favour of the plaintiff Rustomji Pestonji on January 22, 1932 (*vide* Ext. 1). Mehenti executed another mortgage for a sum of Rs. 29,250 in favour of Ibrahim Haji Ismail, defendant No. 1, on March 20, 1922. It appears that Madan Gopal instituted a suit, being Title Suit No. 69 of 1923, to enforce his mortgage against Mehenti, impleading the present defendant No. 3 and defendant No. 1. Defendant No. 3 filed a written statement pleading that Madan Gopal's equitable mortgage was not a fact. Defendant No. 1 also filed a written statement challenging the existence and validity of the equitable mortgage. While the suit was pending, on November 2, 1927, Ismail, defendant No. 1, purchased the right of Madan Gopal on the equitable mortgage and got himself substituted as plaintiff. Thereafter there was a compromise between Ismail on the one hand and the mortgagor Mehenti on the other. On August 25, 1929, the compromise petition was filed and on the following day the Court made an order as follows:—

The plaintiff and the defendant No. 1 (Mehenti) had filed a petition of compromise. The suit be decreed in terms of compromise against defendant No. 1 and dismissed against the other defendants.

The present plaintiff has now brought the suit to enforce his mortgage and further to get a declaration that his rights are not subject to the alleged equitable mortgage which was the subject matter of suit No. 69 of 1923. The suit is contested by Ismail, defendant

No. 1. His main defence is that the plaintiff's mortgage is subject to the aforesaid equitable mortgage. The learned Subordinate Judge has held in favour of the plaintiff and decreed the suit. Hence this appeal by the heirs of defendant No. 1, who has since died. It may be stated here that the plaintiff has also since died and the Official Trustee of Bengal as trustee to the estate of the deceased has been substituted in his place.

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In the trial Court a question was raised as to the *factum* of the equitable mortgage. Mr. Gupta for the appellant has pointed out that the equitable mortgage is expressly mentioned in the plaintiff's own title-deeds, namely, the mortgage bond Ext. 8 and the conveyance Ext. 1. Mr. S. M. Bose, appearing for the respondent in this Court, has conceded that he cannot dispute the *factum* of the equitable mortgage and that it may be taken that the parties themselves thought that a valid equitable mortgage was created by Mehenti in favour of Madan Gopal. The real question between the parties is whether the so-called equitable mortgage is valid in law. The learned Subordinate Judge has taken the view that it was invalid by reason of the fact that it was really created by a letter of which Ext. 17 is a copy, and that letter was not registered. Mr. Gupta, for the appellant, has contended that the learned Subordinate Judge should not have allowed this question to be raised, because it was not raised in the pleadings. There was, however, an issue, namely, issue No. 5:—

Were the alleged equitable mortgages, dated March 16, 1920, and February 11, 1921, valid and legal and are the said mortgages enforceable in law?

The second mortgage above-named is not in question now. Order No. 54, dated July 12, 1935, in the order-sheet shows that defendant No. 1 attempted to have this issue struck out, but he failed. Ext. 4 is a certified copy of the written statement filed in suit

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No. 69 of 1923 on behalf of the mortgagor Mehenti. Paragraph 1 of the written statement runs as follows :—

This defendant admits the correctness of the statements made in paras. 1, 2 and 3 of the plaint, but states that on March 3, 1920, and on March 16, 1920, letters were passed between this defendant and the plaintiff evidencing the contract under which the deposits of shares and title deed of Khandra property were made on the said March 3, 1920, and on March 16, 1920. This defendant submits that the said letters should be produced by the plaintiff and this defendant relies upon the terms of the said letters when produced.

This, it appears, put the plaintiff in this suit upon an enquiry and he gave notice to the defendant No. 1 to produce the letter. On July 9, 1935, in the course of the hearing, the defendant filed a petition stating that he had no such letter. The evidence shows that on July 3, 1935, the plaintiff made an attempt to search the record of suit No. 69 of 1923 in the Burdwan record room. The result is disclosed in the evidence of Nathuni, witness No. 5, for the plaintiff. He states that the document was not found in the record, having been returned to the pleader of defendant No. 1. This witness was an officer of Madan Gopal at the time of suit No. 69 of 1923 and it was he who filed the plaint. He deposes that on that occasion typed copies of the letter in question were prepared for the use of the pleader and he retained one of those copies which is Ext. 17. He swears that, except that the signature was not copied, this copy (Ext. 17) is a true copy of the letter of 16th March written by P. S. Mehenti. On the other side there is the only evidence of one Tarapor Wala. The learned Subordinate Judge has discussed the depositions of these two witnesses and he has held that Nathuni should be believed and that Tarapor Wala should not be believed. Having perused their evidence we are in entire agreement with the trial Court. It is no doubt true that Mehenti is now siding with the plaintiff while Tarapor Wala is siding with the defendant No. 1. But the remarkable fact is that neither Mehenti, who was present in Court, nor Gokul Das, one of the partners of the firm of Madan Gopal,

who is said to have taken delivery of the title-deeds, has been examined. There is no reason to doubt the evidence of Nathuni, which is to the effect that a letter was addressed by the mortgagor at the time of the so-called equitable mortgage and Ext. 17 is a true copy of that letter.

Then comes the question whether the mortgage was invalid by reason of the fact that the letter was not registered. The law on the subject has been explained in various cases ranging from the leading case of *Kedarnath Dutt v. Shamloll Khettry* (1) to *Obla Sundarachariar v. Narayana Ayyar* (2). Ordinarily a mortgage by deposit of title-deeds would be an oral transaction. But, as a matter of practice, it is not unusual for the deposit to be accompanied by a memorandum in writing. *Miller v. Madho Das* (3). If there is such a writing, the question is whether it creates the mortgage or whether the mortgage is complete without the writing, the writing being merely the statement of facts which would evidence the mortgage. If the writing creates the mortgage, it must be registered. Everything depends upon the memorandum in writing which in each case has got to be construed and it has been pointed out that the distinction may be very fine. It has also been pointed out that where the writing explains the reason why the deeds are deposited, and there is nothing but the writing to connect the deposit with the deed, the writing must be registered. *C. B. Swami Chetty v. S. T. Ethirajula Nayudu* (4). The case law on the subject has grouped round the following cases which were cited at the Bar. *Kedarnath Dutt v. Shamloll Khettry* (*supra*), *Subramonian v. Lutchman* (5), *Obla Sundarachariar v. Narayana Ayyar* (*supra*) and *Bhairab Chandra Bose v. Anath Nath De* (6). Sometimes stress has been laid on the fact that the memorandum was written subsequent to the deposit of the

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

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title-deeds. In *Kedarnath Dutt's* case cited above there was evidence that the transaction was completed in the morning and the document was executed in the evening. The document started with the words "for the re-payment of the loan of Rs. 1,200 "and interest thereon, *etc.*," but it did not contain the terms of the transaction. It was held that registration was not necessary. In *Subramonian's* case the document contained the words "we hand you title "deeds, *etc.* This please hold as security, *etc.* "Please also *hold this* as further security." Their Lordships held that the memorandum was the bargain between the parties and so required registration. In *Obla Sundarachariar's* case, it was held that the document in question was merely a list of the title-deeds and did not indicate the terms of the agreement or the nature of the matter. So the document did not require registration. In *Bhairab Chandra Bose's* case, the document recites "I hereby put on record that "the title-deeds regarding my premises already deposited with you shall be held as collateral security." It was held that the latter constituted a mortgage contract and so it was inadmissible for want of registration. Now in the present case the document, vide Ext. 17, runs as follows :—

Calcutta,

March 16, 1920.

Messrs. Nursing Sahai Madan Gopal, No. 12, Portuguese Church Street, Calcutta.

Dear Sirs,

As collateral security for the due repayment of the loan of Rs. 1,25,000 (one lakh twenty-five thousand rupees) which you have this day lent and advanced to me on my *hundi* of to-day's date (payable 90 days hence without grace) on Babu Hari Mohan Ganguli and accepted by him for Rs. 1,25,000 (one lakh twenty-five thousand) with interest and costs as between attorney and client, I herewith deposit with you my principal title-deed relating to my Khandra Colliery property in district Burdwan described in the schedule "A" hereunder written, I hereby also undertake to deposit with you in Calcutta the other title-deeds relating to the said Khandra Colliery property, a list of which is given in schedule "B" hereunder written, and if any of the said last mentioned title-deeds happen to be not with me I will procure them if possible or else account for them.

I further place on record that interest will run on the amount of the said *hundi* at the rate of Rs. 3,000 (three thousand rupees) per month from and after the expiry of 90 days from the date until realisation.

Yours faithfully,
(—————)
Schedule.

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The evidence of Nathuni, which there is no reason to disbelieve, is to the effect that the letter was written by Mehenti and addressed to Madan Gopal. He states:—

The letter was written acknowledging that a loan of Rs. 1,25,000 was taken by P. S. Mehenti from Nursing Sahai Madan Gopal and as security for the debt title-deeds of Khandra Colliery were deposited with Nursing Sahai. This letter was of March 16, 1920.

It is clear that the letter embodies the terms of the loan and that it is contemporaneous with the transaction, it accompanied the delivery of title-deed and also informed the party that further title-deeds were to follow. It also contained a calculation of the amount of interest. We agree with the trial Court in holding that the document created the mortgage and, therefore, should have been registered. As it was not registered the mortgage is not valid in law.

On this finding no other question really arises, but as the other question, which has been called a question of *res judicata*, has been debated in the trial Court as also in this Court, we proceed to dispose of it. The relevant issue is issue No. 9 which runs as follows:—

Has the defendant No. 1 (Ibrahim Haji Ismail) any right as mortgagee still subsisting by his alleged purchase after the compromise decree in suit No. 69 of 1923 ?

The question is whether, after the aforesaid compromise, defendant No. 1 can seek protection under his prior mortgage in the present mortgage suit and use it as a shield against the plaintiff. In the trial Court the defence contended that the decree of dismissal in suit No. 69 of 1923 was a decision under O. IX of the Code of Civil Procedure. The plaintiff

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contended that it was a decision under O. XVII, r. 3. The learned Subordinate Judge decided in favour of the plaintiff's contention. In this Court Mr. Gupta for the appellant has conceded that, since the decree of dismissal stands unchallenged, it makes no difference whether that decree was made under O. IX, or under O. XVII. The question is, what is the effect of the decree of dismissal. The order has been quoted above. The relevant portion is that the suit "be decreed in terms of compromise against defendant "No. 1 and dismissed as against the rest." In the trial Court, as also in this Court, the defence has relied on the authority in the case of *S. K. A. R. S. T. Chettyar Firm v. A. L. A. R. Chettyar Firm* (1). It was pointed out that in that case the puisne mortgagee did not put in appearance, no defence was raised by him impeaching the validity of the prior mortgage, and so no issue was raised. In the present case issues were raised in the title suit No. 69 of 1923. The relevant issues are issue No. 5 to the effect:—

Whether the equitable mortgage with respect to the Khandra Colliery is valid, *bona fide* and operative one? And is it enforceable?

And issue No. 11 is to the effect:—

Whether the plaintiff is entitled to enforce his rights under the equitable mortgage in respect of the balance due after instituting the suit No. 2789 of 1921 in the High Court and obtaining decree therein?

Thereafter certain steps were taken. The order-sheet (*vide* Ext. 21) shows that the plaintiff Madan Gopal applied to examine the attorney. The evidence is that the letter (*vide* Ext. 17) was issued from the office of the attorney P. N. Sen. This application was, however, refused. Madan Gopal did nothing more in that direction, but he proceeded to get rid of his mortgage by assigning it to Ismail, defendant No. 1. Ismail then got himself substituted as plaintiff and proceeded to compromise with the mortgagor. Before that the mortgagor had filed written statement

[*vide* Ext. 4(a)] challenging the procedure adopted by Ismail. However, they compromised as a result of which Mehenti gave a complete go by to his previous allegations. The allegations in defence raised by Limji, however, stood though he did not appear at the final hearing after the compromise. The order was to the effect that the suit was dismissed as against those respondents who had not entered into the compromise. Mr. Gupta has contended that this should mean that these defendants were dismissed from the suit. That, however, is not the wording of the order which was actually made, nor could such an order be consistent with the provisions of the Code. Mr. S. M. Bose has rightly pointed out that, if the intention was to withdraw the suit as against the non-compromising defendants, the plaintiff could not bring a fresh suit without the previous permission of the Court. As the matter stands now, it would not be possible for Ismail to bring another suit against Limji or his representative-in-interest raising the same point which was in issue in suit No. 69 of 1923. It seems to us, therefore, that the compromise decree in suit No. 69 of 1923 is no bar to the plaintiff's obtaining a declaration that his mortgage is not subject to the equitable mortgage of the defendant No. 1. On the contrary the result of the suit No. 69 helps the plaintiff to obtain such a declaration. The suit has therefore been rightly decreed.

The appeal therefore fails and it is dismissed with costs.

PATTERSON J. I agree.

Appeal dismissed.