

APPELLATE CIVIL.

*Before Sir S. Subrahmania Ayyar, Offg. Chief Justice, and
Mr. Justice Boddam.*

1904.
March 4.

KONCHADI SHANBHOGUE AND OTHERS (DEFENDANTS),
APPELLANTS,

v.

SHIVA RAO AND ANOTHER (PLAINTIFFS), RESPONDENTS. *

*Transfer of Property Act—IV of 1882, ss. 54, 100—Agreement to execute a mortgage
over immoveable property—Charge—Deposit of title-deeds—Mortgage.*

Plaintiffs sued defendants for money lent and also claimed to be entitled to charge the debt on immoveable properties belonging to the defendants. Defendants had executed a document in which they recited that they had deposited the title-deeds of immoveable properties with the plaintiffs, and undertook to execute a deed of mortgage over those properties in favour of the plaintiffs whenever the latter should call upon them to do so. This deposit had been made outside of the town of Madras, and the document had not been registered :

Held, that plaintiffs were not entitled to a charge on the immoveable property, but only to a personal decree. A deposit of title-deeds creates a mortgage and not a mere charge, under the Transfer of Property Act, and inasmuch as section 59, paragraph (3), necessarily implies that a deposit of title-deeds not evidenced by a writing duly attested and registered is valid only if made in the towns specified in the paragraph, it follows that a grant of security by a mere deposit of title-deeds unaccompanied by writing, duly attested and registered, evidencing it, is invalid if it takes place outside of those towns.

SUIT for money as against defendants personally, and as against their joint family property. First defendant was the father of defendants Nos. 2 and 3, and these three defendants constituted a joint Hindu family. Defendants had borrowed money from plaintiffs for their trade, and executed two documents on 19th October 1894, which were in the following terms :

Exhibit M. "The following is the agreement or karar executed on the 19th October 1894 in favour of [plaintiff] by [defendants] :—In connection with the business of commission agents for coffee which we are carrying on for our family, besides the money which we have until now obtained from you on interest at the rate of 10 per cent., we are in need of up to Rs. 25,000 more ;

* Appeal No. 122 of 1902, presented against the decree of M.R.Ry. O. S. R. Krishnamma, Subordinate Judge of South Canara, in Original Suit No. 53 of 1901.

therefore as a security for the amounts which you have paid and will hereafter pay under the arrangement made, namely, that just as the amounts hitherto obtained from you have been entered in a book, the amounts to be hereafter obtained also must be entered in your book under the signature made by one of us and must be repaid by the end of March 1895, the amount repaid to you being also entered in that book under your signature or being paid into the Bank to your account. We have this day executed in your favour a promissory note payable on demand for Rs. 35,000. We have this day given into your hands the documents mentioned below as security for the said amount and we have hereby agreed to execute whenever you may ask for it a deed of mortgage for a period of one year upon the responsibility the immoveable properties appearing therefrom. We have agreed and consented to pay interest at the rate of 10 per cent. upon the amount of the said mortgage deed."

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Exhibit II. "(Rs. 35,000) thirty-five thousand rupees only dated 29th October 1894. We do hereby promise to pay on demand to [plaintiff], or order, the sum of Rs. 35,000 with interest at the rate of 10 per cent. per annum. We have received the consideration herefor. (Signed) [Defendants]."

Neither of these documents had been registered. Plaintiffs contended that the effect of the agreement, exhibit M, was to make the debt a charge upon the properties to which the documents referred to in it related. The documents of title were deposited in a place outside the town of Madras. The first issue raised the question whether the plaintiffs were entitled to charge the debt on the properties, and the Subordinate Judge held that they were. He decreed in plaintiffs' favour against the defendants personally and passed the usual mortgage decree against the properties charged.

Defendants preferred this appeal.

C. Ramachandra Rau Sahib and *K. P. Madhava Rau* for appellants.

C. Sankaran Nair and *K. Narayana Rau* for respondents.

JUDGMENT.—A mere agreement in writing by an obligor to execute a mortgage of immoveable property to the obligee does not create an interest in the immoveable property so as to entitle our Courts to treat it as a charge. Compare section 17 (h) of the Registration Act (III) of 1877 and section 54, paragraph 4, of the Transfer of Property Act. Assuming the contract evidenced

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by exhibit II and exhibit M would constitute a mortgage of or a charge on immoveable property it is not valid, for, those exhibits not having been registered and the interest said to be created thereby being of the value of more than Rs. 100, those exhibits cannot in any way affect the immoveable property comprised therein. Looking at the transaction as one intended to be the grant of a security by deposit of title-deeds only, the deposit having been made outside the town of Madras and subsequent to the Transfer of Property Act the transaction in that view also must fail. No doubt, if the grant of security by deposit of title-deeds of immoveable property amounts to no more than the creation of a charge and is not a mortgage within the meaning of the latter term in the Transfer of Property Act, the decree of the lower Court would be altogether correct under section 100 of that Act. But section 59 of the Act prescribing the formalities to be attended to in making a mortgage speaks in explicit terms of the grant of such security as a 'mortgage,' consequently a deposit of the kind must, for the purposes of the Transfer of Property Act, be held to be a mortgage and not, within the purview of section 100, a mere charge not amounting to a mortgage. And as the third paragraph of section 59 already referred to necessarily implies that a deposit of title-deeds not evidenced by a writing duly attested and registered is valid only if made in the towns specified in the paragraph it follows that a grant of security by a mere deposit of title-deeds unaccompanied by writing duly attested and registered evidencing it is invalid if it takes place in the mufassil. The decree of the Subordinate Judge must therefore be set aside except in so far as it gives a personal decree for the money and costs as against the defendants.

In the circumstances of the case we direct that the parties do bear their costs in this Court.
