In re TIRUMALA REDDI.

SCHWABE, C.J.

of the Indian Penal Code was entirely wrong. No offence under that section has been committed. The order of conviction must, therefore, be set aside and the fine, if paid, must be refunded.

Panchayat Courts have got ample powers to deal with such cases. They can simply go on with the case. Having heard the evidence, if they choose to convict, their conviction will be perfectly in order, although the accused has failed to plead and although the accused by his demeanour has been contemptuous of the Court which has been trying him.

WALLER, J.

WALLER, J.—I agree to the order proposed. It is quite clear that section 179 of the Indian Penal Code has no application to a refusal to plead to a charge.

D.A.R.

APPELLATE CIVIL.

Before Sir Walter Salis Schwabe, Kt., K.C., Chief Justice, and Mr. Justice Ramesam.

1923, November 30.

VELAMAKANYA KRISHNAIYA (APPELLANT),

v.

PONNUSWAMI AIYAR AND ANOTHER (RESPONDENTS).*

Equitable mortgage—Unregistered document evidencing the mortgage, admissibility of.

To ascertain whether an unregistered document creates an equitable mortgage, the test is whether it constitutes the bargain between the parties, i.e., whether it records a contemporaneous loan and deposit of title-deeds or whether it merely records an already completed transaction of loan and deposit. It is only in the former case the document is inadmissible for want of registration. *Subramonian* v. *Lutchman*, (1923) I.L.R., 50 Calc., 338 (P.C.) and *Shaw* v. *Foster*, (1872) 5 H.L., 321, followed.

ON APPEAL from the Judgment of the Hon'ble Mr. Justice PHILLIPS, dated 3rd March 1922, passed in the exercise of

* Original Side Appeal No. 54 of 1922.

the ordinary original civil jurisdiction of this Court in Original Suit No. 348 of 1920.

The facts are given in the Judgment.

V. Radhakrishnayya for the appellant.

H. Rama Rao for the respondent.

JUDGMENT.

SCHWABE, C.J.

SCHWABE, C.J.—This is an appeal from the judgment of PHILLIPS, J., in which he decided that a loan made to the defendant by the plaintiffs' firm secured by promissory notes and by deposit of title-deeds was secured by a valid equitable mortgage. The facts of the case are that the defendant was a servant in a certain firm and had borrowed from time to time monies from that firm secured by promissory notes and by deposit of title-deeds of his house. The firm dissolved and the plaintiffs' firm took over the assets and liabilities of the firm and continued the defendant in their employment. Shortly after the taking over of the firm they made an advance of Rs. 500 to the defendant and took a promissory note from him for the outstanding amount of his indebtedness to the old firm plus Rs. 500 and at a later date they made further advances to him, some secured by promissory notes. About the time of the advance of Rs. 500 the document Exhibit B was executed by the defendant and it runs thus :

"Collateral security letter in respect of a house executed in favour of Messrs. Peruru Viswanadham and Koneti Desikacharyulu Company of Madras As you have this day obtained an assignment of the sum of Rs. 1,945 due by me to Messrs. Peruru Viswanadham & Co., the same being the sum of principal and interest due, I have this day executed a pro-note in your favour for this sum and the sum of Rs. 500 taken to-day, i.e., the total of Rs. 2,445 ; so let it be known that for that I have retained with you as collateral security my document of the Collector's certificate No. 815 in respect of my house bearing door No. 11 in Tiruvattiswaranpet, Madras."

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This, I understand from my learned brother, is a more accurate translation than that printed in the documents. The defendant says that that document is in itself an equitable mortgage of his house and, as it has not been registered, it cannot be given in evidence.

The law on the subject has on several occasions been said to be quite clear, but the application of the law, as far as I can see, has not been easy. The Privy Council in *Subramonian* v. *Lutchman*(1) applying the principles laid down by Lord CAIRNS in the leading case of *Shaw* v. *Foster*(2) said

> "the test is, did the document constitute the bargain between the parties or was it merely the record of an already completed transaction."

If it constitutes the bargain, then, on the well-known rule that, where contracts are reduced to writing, you cannot give parol evidence of their contents, in order to prove the mortgage, the plaintiff would have to attempt to put in as evidence the document, and, if it is a mortgage document, he would be precluded from so doing, by the Transfer of Property Act and under the Registration Act. The question in each case, which it is difficult to decide, is whether or not the document does constitute the bargain or is merely a record of a completed transaction; and I think that when one looks at the cases, the easiest guide is the question whether or not the money was paid before the making of the document, because if the money is handed over contemporaneously with, or in exchange for, the document or after the document it will be very difficult to establish that the document did not contain the terms of the bargain between the parties. In order to arrive at the true facts in respect of that question, I think that the first thing to do is to look at the document itself. In many

(1) (1923) I.L.R., 50 Calc., 338 (P.C.). (2) (1872) 5 H.L., 321.

cases, it will appear from the document that the document is handed over before any advance is made; in some cases it will appear from the document that the document comes into existence in reference to a prior advance as for instance, where an advance is secured by a promissory note and the document giving equitable mortgage of the property as security is dated at a later date than the time of the advance; and, as a general rule, the terms of the document itself are a better guide to the truth than the verbal evidence given afterwards by persons either trying to escape from the liability or to establish it. The terms of the document are to the effect that the matter had already been completed, and I do not think that this document was made to create a charge. I think it was merely recording the charge which had already been created, and I think it can be said that there was here a completed contract of mortgage before the letter was passed, so distinguishing it from *Bhairab Chandra Bose* v. *Anath Nath De*(1) where, on the terms of the document there and from the surrounding circumstances, it was held that it could not be said that there had been a completed contract before the letter was passed. I rely mainly on the past tense used in the letter. It says that the promissor has executed the promissory note and that he has taken a sum of Rs. 500 and he purports to inform the new firm that he has left with them his documents as collateral security. I think on the whole it is merely recording the facts for their information and, of course, in order to provide them with strong evidence if necessary, and not making the bargain by the letter.

The oral evidence is not satisfactory. The defendant himself does not make good on his evidence the case for which he is contending. The evidence called by the

(1) (1920) 57 I.C., 686.

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plaintiff is not satisfactory because it is that of a *gumasta* who knew very little about the facts and that of a partner of the firm who, though he gives some strong evidence from which it could be inferred that the bargain had been in fact completed before this document, does not pretend to have been present or to be able to give definite first hand evidence of the facts.

On the whole, I must come to the conclusion that the learned Judge is right. I should add that, in his judgment, he expressed the view that, even if this document did contain the terms of the contract made, it would be possible for the plaintiffs to prove their equitable mortgage by proving the fact of the deposit of the title-deeds with them. In so holding, he was following the decision in *Elumalai Chetty* v. *Balakrishna Mudaliar*(1) which, I think, in view of the later decision of the Privy Council in *Subramonian* v. *Lutchman*(2), can no longer be taken to be the law.

The appeal must be dismissed with costs. The Receivers may take their costs from the estate in the first instance. Six months' time is allowed for redemption.

RAMESAM, J.

RAMESAM, J.—I would add that the translation of Exhibit B even in the first sentence is not strictly accurate. It ought to run "As I have this day got novated in your favour the sum of Rs. 1,945, etc." The Telugu is "Avala" which means novation and not assignment. If the plaintiffs' firm are assignees from the old firm, strictly the assignment would have to be by a registered instrument. But no such difficulty arises. I agree with my Lord's judgment.

N.R.

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(1) (1921) I.L.R., 44 Mad., 965. (2) (1923) I.L.R., 50 Calc., 338 (P.C.).