1883

BALKISHEN DAS v. RUN BAHADUR SINGH.

Their Lordships are of opinion that the judgment and decree of the High Court of the 25th of February 1880 ought to be reversed, and that it ought to be declared that in adjusting the accounts between the parties, for the purpose of the proceedings in execution of the decree of 1873, the defendant is to be charged with the principal sum of Rs. 2,38,000 and interest at 8 annas per cent. per mensem from the date of the decree upon the said principal sum, or so much thereof as from time to time remains due after giving credit for all payments made on account, together with additional interest at the same rate on the first instalment from the date of the solehnama to the payment of such instalment, and also additional interest at the same rate on the principal sum remaining unpaid for the period between the day on which the second or any subsequent instalment became due and the day on which it was paid or realized, and that each instalment or any payment on account thereof as paid is to be credited first in discharge of the interest then due and the balance towards reduction of the principal.

Their Lordships will humbly advise Her Majesty to the above effect.

The respondents must pay the costs of this appeal.

Appeal allowed.

Solicitors for the appellant: Mr. *T. L. Wilson.*

Solicitors for the respondent: Messrs. *Watkins* and *Lattey.*

ORIGINAL CIVIL.

Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Cunningham.

1884.
January 4.

THE BENGAL BANKING CORPORATION (PLAINTIFFS) *v.* S. A. MACKERTICH (ONE OF THE DEFENDANTS.)

Registration (Act III of 1877), *s.* 17 *cl.* (*h*)—*Agreement to Mortgage—Equitable Mortgage.*

Documents amounting to an equitable mortgage when creating an interest in land of the value of Rs. 100 or upwards, require registration under s. 17 of the Registration Act; but documents when amounting merely to an agreement to mortgage do not require registration under that section.

Such documents are therefore available in evidence as agreements to mortgage without registration, but for the purpose of proving an equitable mortgage they must be registered before they are available in evidence.

1884

THE BENGAL BANKING CORPORATION v. MACKERTICH.

APPEAL from a decision of PIGOT, J., dated 28th January 1883.

Under a power-of-attorney, dated the 1st of February 1880, Mrs. Mackertich empowered one M. J. N. Mackertich, her husband, to sell or mortgage a one-fifth share of a house in Calcutta, to which she was entitled in her own right. In September 1880 M. J. N. Mackertich arranged to borrow from the Bengal Banking Corporation a sum of Rs. 8,000. On the 1st October 1880 the Bengal Banking Corporation advanced that sum to M. J. N. Mackertich and Hem Chandra Bannerjee on the security of a promissory note signed by Hem Chandra Bannerjee and J. M. Mackertich as attorney for his wife, which ran as follows:—

"Four months after date, we jointly and severally promise to pay to the Bengal Banking Corporation, Limited, or order, at Calcutta, the sum of Rs. 8,000 for value received, with interest thereon at the rate of 18 per cent. per annum, and as collateral security for the said debt, I and Sarah Amelia Mackertich do hereby agree to assign, by way of mortgage to the said Bengal Banking Corporation, Limited, an undivided one-fifth share to which the said Sarah Amelia Mackertich is entitled in her own right of and in the three-storied house and premises, No. 17, Elysium Row, in the town of Calcutta."

On the 28th January 1881, M. J. N. Mackertich (with the consent of his wife) sold his wife's one-fifth share of the house to some third person for Rs. 13,000. On the 29th January 1881, M. J. N. Mackertich died after having received the purchase-money. The estate of M. J. N. Mackertich came into the hands of the Administrator-General of Bengal, and with it the purchase-money of the house.

The Bengal Banking Company, Limited, then brought this suit against the Administrator-General and Hem Chandra Bannerjee to recover the sum advanced to them on their promissory note, upon their personal liability, and also against Mrs. Mackertich, praying that the sum of Rs. 8,000 might be paid out of the Rs. 13,000 in the hands of the Administrator-General.

The defendant contended that as the promissory note was not registered, it could not be used as a mortgage, or as creating any interest in the mortgaged property, although it might

be admissible in evidence as a promissory note, or as an agreement to execute a mortgage.

Mr. *Kennedy* and Mr. *Bonnerjee* for the plaintiffs.

Mr. *T. A. Apcar* for the defendants.

PIGOT, J.—I am greatly obliged to the learned Counsel for his able argument on behalf of the plaintiffs.

But in my opinion the plaintiffs have not succeeded in establishing a sufficient case to make it necessary for me to call upon the defendant.

The case that has just been urged is twofold:—

First, a claim to Rs. 8,000 which is claimed by the plaintiffs against a sum of Rs. 13,000, the product of the sale of the share of a house, No. 17, Elysium Row, which Mr. Kennedy clearly stated is claimed in virtue of rights arising from the execution of the document, which is exhibit B in suit, rights attaching on property, the sale of which realized the Rs. 13,000.

But s. 17 of the Registration Act renders it impossible for me to give any effect whatever to this document so far as it would create an interest in immovable property, it not having been registered according to that section, and I, therefore, hold that this cannot be done.

Mr. Kennedy then argued, that inasmuch as this document would give a right to seek specific performance, it bound the conscience of the lady, whose attorney executed it, so as to place the person with whom the agreement was entered into, in the same position as if the contract had been carried out. But this seems to me no more than a mode of describing the manner in which equitable considerations may operate to create an interest in immovable property, in respect of which a contract and not a conveyance has been entered into.

The intention of the Registration Act was, I think, that it should be impossible to use an unregistered document, so that it should have directly or indirectly the effect of creating an interest in immovable property. I admitted exhibit B in evidence "not as affecting any immovable property referred to in it, but merely as evidence of a contract to execute a mortgage, and of

1884

THE BENGAL BANKING CORPORATION v. MACKERTICH.

the transaction recorded in it (inclusive of the obligation created by the words promising to pay) save so far as it, *i.e.*, the transaction, affected the immovables," and I think the document cannot be allowed directly or indirectly to have any further effect.

Secondly, it was argued that the document operated to bind Mr. Mackertich to execute the mortgage; and that such mortgage must contain the usual covenant to pay the money within the time which the mortgage deed would have stipulated: that this must be treated as having been done, and that the case must be treated as one in which a covenant to pay the money had been entered into, a breach committed, and a claim now made in this suit in respect of the debt or obligation therein arising. I do not think that these considerations would entitle me to hold that a debt became due in respect of exhibit B from Mrs. Mackertich to the plaintiffs.

Under these circumstances, these being the only two reliefs claimed against Mr. Mackertich, the only decree that can be made is a decree against the estate of Mr. Mackertich himself. A decree will go against his estate and against Hem Chandra Bannerjee as a matter of course with costs on scale 1.

Nothing has been urged about the Rs. 500 remitted to Mr. Mackertich, and there is nothing in this case to connect Mr. Mackertich in any way as a borrower with the plaintiffs, there is no privity between Mrs. Mackertich and the plaintiffs in respect of money borrowed. As Mr. Kennedy has pointed out, the power-of-attorney does not contain a power to borrow money, save by way of mortgage.

I wish it to be understood that as to the operation of the Registration Act, I follow with a complete assent, the judgment of Mr. Justice West in the case (1) which has been a good deal discussed in argument before me.

There will be a decree against Hem Chandra Bannerjee in terms of the prayer, and also against the estate of Mackertich in terms of prayer D, with costs against Hem Chandra on scale 2. The plaintiffs will pay the costs of Mrs. Mackertich and the Administrator-General on scale 2. There will be a decree for administration of Mackertich's estate.

The plaintiffs appealed against this judgment as far as it related to the defendant Sarah Amelia Mackertich.

(1) I. L. R., 5 Bom., 143.

Mr. *Kennedy*, with him Mr. *Bonnerjee*, for the appellants.

The share in the house having been sold after the promissory note was executed, the proceeds of the sale became subject to the charge in favour of the plaintiffs in the same way as the property itself was so subject before the sale. It is submitted, moreover, that the document is not one requiring registration under s. 17 of the Registration Act; it is really an equitable mortgage in the form of an agreement to mortgage, and even treating it as an agreement to mortgage, we should be entitled under it to a charge upon the Rs. 13,000.

It was an instrument which we could have specifically enforced against Mrs. Mackertich if the property had not been sold, and not being in a position to specifically perform it against the purchaser, we are entitled to enforce it against the person who made the agreement. There is a personal liability on the part of Mrs. Mackertich to bring the property in, not by way of charge, but by way of compelling her to perform the agreement.

The Court here intimated to Mr. *Kennedy* that it would not be necessary for him to go into the other questions in the appeal.

Mr. *Pugh* and Mr. *T. Apcar* for the respondent were not called upon.

The following judgments were delivered by the Court (GARTH, C.J., and CUNNINGHAM, J.)

GARTH, C.J.—This is an appeal by the plaintiffs against the judgment of the Court below, so far only as it concerns the defendant Sarah Amelia Mackertich. Against the other two defendants the learned Judge made a decree, but refused to make one as against Mrs. Mackertich.

The claim against her was of this nature.

By a deed, dated the 1st of February 1880, Mrs. Mackertich gave to her husband, M. J. N. Mackertich (since deceased) a power-of-attorney to sell or mortgage a one-fifth share of a house in Elysium Row, to which she was entitled in her own right.

Being so empowered, Mr. Mackertich in the month of September in the same year, arranged to borrow from the plaintiffs' Bank a sum of Rs. 8,000, and on the 1st of October they lent him that money upon the security of a promissory note of that

1884

THE BENGAL BANKING CORPORATION v. MACKERTICH.

date signed by himself, and Hem Chandra Bannerjee (the other defendant in this suit) and also signed by himself as attorney for his wife Mrs. Mackertich. The note was in this form. (See *ante*, *p.* 316).

Having obtained the Rs. 8,000 upon this security, Mr. Mackertich (apparently with the plaintiffs' knowledge), sold his wife's one-fifth share of the house to some third person on the 28th of January 1881 for a sum of Rs. 13,000, and having received the purchase-money, he died on the following day, the 29th of January.

His estate then came into the hands of the Administrator-General to be administered in due course of law, and with it the Rs. 13,000, and this suit was afterwards brought by the plaintiffs to recover the sum due for principal and interest upon the promissory note against the Administrator-General (as representing Mr. Mackertich's estate and Hem Chandra Bannerjee upon their personal liability, and as against Mrs. Mackertich), praying that the Rs. 8,000 and interest might be paid out of the Rs. 13,000 in the hands of the Administrator-General.

It seems clear that the power of attorney gave Mr. Mackertich no right to pledge his wife's personal credit by the promissory note, so that the only way in which she could be affected would be by charging her Rs. 13,000 in the hands of the Administrator-General with the amount due upon the note, as representing the one-fifth share of the property which her husband had agreed to mortgage.

Mr. Kennedy has contended here for the appellants, (as he did in the Court below), that, the one-fifth share having been sold after the note was given, the proceeds of the sale became subject to the charge in favor of the plaintiffs' Bank in the same way as the property itself was so subject before the sale.

To this Mrs. Mackertich's first answer was, that the note was not registered, and although it might be admissible in evidence as a promissory note or even as an agreement to execute a mortgage, it was not available in any way to the plaintiffs, as a mortgage, or as creating any interest in the mortgaged property, without registration.

It is upon this point and this point only, as we understand, that

1884

THE BENGAL BANKING CORPORATION v. MACKERTICH.

the judgment of Mr. Justice Pigot proceeds. He held that this document could not be put in evidence, or be treated as creating an interest in land, or in the Rs. 13,000, the produce of the land, inasmuch as it had not been registered.

But he considered that the document was receivable in evidence and available for another purpose, namely, that of charging the other defendants personally with the amount of the debt, and he accordingly gave the plaintiff a decree against those defendants personally.

In arriving at this conclusion the learned Judge appears to have relied upon a case decided by Mr Justice West in the Bombay High Court.

In that case a suit was brought for specific performance of an agreement to purchase a house, which was to this effect:—"This day I have sold to you my house in which I live, for Rs. 1,900; and on account thereof I have received from you Rs. 100 as earnest at the time of execution of this bargain. And as to the remaining Rs. 1,800 the same are duly to be paid to me within one month from this day, when you will get the deed made in your favor."

This document was not registered; and the question arose, whether, inasmuch as the transaction had been partially carried out under it, and an interest in the property created in favor of the purchaser, the document was admissible in evidence for the purposes of the suit, without being registered, and as I understand Mr. Justice West, his view was much the same as that taken by Mr. Justice Pigot here.

He considered that although as *creating an interest in land* the document was not receivable in evidence, it might be used for the purposes of the suit, namely, for the purpose of obtaining a specific performance of the agreement.

This really seems the only sensible way of reconciling the provisions of clauses (*b*) and (*h*) of s. 17 of the Registration Act. By clause (*b*) any document which purports to create an interest in land requires registration, and if not registered, it is (by s. 49) not available as affecting the property comprised therein. But by clause (*h*) any document not itself creating an interest in land,

1884

THE BENGAL BANKING CORPORATION v. MACKERTICH.

but merely a right to obtain another document which would create such an interest, does not require registration.

We all know that there are a great many documents coming within the description of clause (*h*) which may amount nevertheless to what are called equitable mortgages, and so create an interest in land. As such, they would require to be registered, though as mere agreements to mortgage, they, under clause (*h*), would not. The only way, therefore, of meeting the difficulty seems to be, to hold that they are available for the one purpose without registration, but not for the other.

This is only extending to that class of cases the principle which we have laid down in the Full Bench case of *Ulfutunnissa* v. *Hossein Khan*, (1.)

It is clear, that if we we re to hold that equitable mortgages when they are in the form of agreements to mortgage, do not require registration, such instruments would be generally used instead of legal mortgages, for the very purpose of avoiding registration; whilst on the other hand, if we hold that any document which amounts to an equitable mortgage cannot be used as an agreement to execute a mortgage, we should be defeating the clear intention of clause (*h*) of the Registration Act.

Mr. Kennedy in the course of his argument reminded us of a large class of cases, which are to be found in the English Reports, in which difficult questions used formerly to arise, whether certain documents amounted to leases, or only to agreements for leases. As leases they required one kind of stamp, as agreements for leases another kind of stamp. Now these cases rather serve to illustrate the principle, upon which I think we ought to decide the present question.

After the passing of the Act 8 and 9, Viet., c. 106, (the act to simplify the transfer of property,) all doubts with regard to these documents were at an end, because by s. 3 of that Act, all leases which were required by law to be in writing, that is, all leases for three years and upwards), were void unless made by deed, and the consequence was, that no document which secured to the lessee an interest for more than three years was

(1) I. L. R., 9 Calc., 520.

valid *as a lease*, unless made by deed. But from that time the Courts were in the habit of construing those documents, which under the Act *were void as leases, as agreements for leases*, in order to render them effectual.

So here, although we must treat a document like the present as ineffectual to create any interest in land, we may treat it as valid for any other legitimate purpose. Thus, we may deal with this instrument as a promissory note, or as an agreement to execute a mortgage.

Mr. Kennedy goes so far as to contend, that even treating the document as a mere agreement to mortgage, his clients would be entitled under it to a charge upon the Rs. 13,000.

But I think that is not so. Unless they can treat the note as an equitable mortgage, the plaintiffs cannot, in my opinion, claim a charge upon the Rs. 13,000.

I think, therefore, that the Court below was right, and that this appeal should be dismissed with costs on scale 2.

I should add that even supposing that this document were admissible and effectual, as Mr. Kennedy contends, I think that other questions of equity would probably arise, which we have now abstained from considering. The defendant Mrs. Mackertich has not been called upon to go into her case at all. In fact we have stopped Mr. Kennedy from going into any other question, except that which was decided by the Court below.

CUNNINGHAM, J.—I agree in thinking that the judgment of the Court below must stand.

Mr. Mackertich having a power-of-attorney to sell or mortgage his wife's property, signed on her behalf a joint and several promissory note for Rs. 8,000, and as collateral security agreed to assign by way of mortgage her interest in certain property.

The plaintiffs state that subsequent to this Mr. Mackertich effected a sale of the property for Rs. 13,000 and this Rs. 13,000, on Mackertich's death, passed into the hands of the Administrator-General. The plaintiffs complain that the Administrator-General refuses to recognize their claim on the specific Rs. 13,000 which they say is liable to the debt, but regards it merely as enforceable against the general property of the deceased.

1884

THE BENGAL BANKING CORPORATION v. MACKERTICH.

The question, therefore, raised in the case is the plaintiffs' right, in virtue of this document, to follow the sum of Rs. 13,000 in the hands of the Administrator-General, and render it liable for the debt which the joint and several promissory note created.

I think that what was said in the Court below, and has just been said by my lord, makes it clear that it is only by treating this document as a mortgage and investing it with all the effects of a mortgage that we could do what the plaintiffs ask, and as I think we are precluded by the Registration Act from allowing it to have this effect, I agree in thinking that the appeal must be dismissed.

Appeal dismissed.

Attorneys for appellants: Baboo *Gonesh Ch. Chunder.*

Attorney for respondent: Mr. *Carruthers.*

PRIVY COUNCIL.

P. C.*
1883.
June 20, 21.
July 11.

ISRI DUT KOER AND OTHERS (PLAINTIFFS) *v.* HANSBUTTI KOERAIN AND OTHERS (DEFENDANTS).*

[On appeal from the High Court at Fort William in Bengal.]

Declaratary decree, Suit for—Civil Procedure Code (Act VIII of 1859), *s.* 15—*Hindu widow's control over savings of the income of her limited estate.*

A suit brought during the life of a Hindu widow by the presumptive heir, entitled on her death to the possession of the property in which she held her limited estate, to have an alienation by her declared to operate only for her life, is among the exceptions to the general rule established by decision upon Act VIII of 1859, s. 15, *viz.*, that, except in certain cases, a declaratory decree is not to be made unless the plaintiff shows a title to, though he does not ask for, consequential relief.(1)

Held, that although to grant a declaratory decree under the above section, was discretionary with a Court, yet in a suit of this class, known to the law, and in many cases the only practical mode of enforcing the presumptive heir's right to interfere with the widow's alienation, the grounds for the discretionary refusal of the decree should be strong. In this case, the difficulty of the question raised, and the expense of the litigation, which had been referred to as grounds for refusing it, were insufficient reasons.

* *Present:* Lord WATSON, Sir B. PEACOCK, Sir R. P. COLLIER, Sir R. COUCH, and Sir A. HOBHOUSE.

(1) *Kattama Natchiar* v. *Dora Singa Tever*, L. R. 2 I. A. 169; S. C. 15 B. L. R. 83.