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MUHAMMAD SULEMAN KHAN v. FATIMA

TYRRELL, J.—I concur in the views expressed by my brother Straight and with the exception of the *dictum* in the Full Bench judgment in *In the matter of the petition of Mathra Parshad* (1), that "s. 15 of the Charter Act appears to confer administrative authority and not judicial powers," which may not be of the essence of that judgment, I think that judgment does not necessarily preclude an affirmative answer to the question referred to us, while the terms of the section are sufficiently large to justify such an answer.

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November 19.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Oldfield, Mr. Justice Brodhurst, and Mr. Justice Tyrrell.

JIWAN ALI BEG (DEFENDANT) *v.* BASA MAL AND OTHERS (PLAINTIFFS.) *

Act III of 1877 (*Registration Act*), *s.* 17 (*b*) *and* (*c*)—*Mortgage-bond—Indorsements of part-payment Receipt—Registration.*

The strictest construction should be placed on the prohibitory and penal sections of the Registration Act, which impose serious disqualifications for non-observance of registration.

An instrument to come within s. 17 (*b*) of the Registration Act (III of 1877) must in itself purport or operate to create, declare, assign, limit, or extinguish some right, title, or interest of the value of Rs. 100 or upwards in immoveable property. To come within s. 17(*c*), it must be on the face of it an acknowledgment of the receipt or payment of some consideration on account of the creation, declaration, assignment, limitation, or extinguishment of such a right, title, or interest.

In a suit by a mortgagee for the sale of immoveable property mortgaged in certain simple mortgage bonds for amounts severally exceeding Rs. 100, the defendant pleaded that he had made certain payments in respect of the bonds, and in support of his plea relied on indorsements of payment upon them, one of which was as follows:—"Paid on the 21st December, Rs. 3,000." The other indorsements were in similar terms.

Held by the Full Bench (STRAIGHT, J., doubting) that the indorsements, even if assumed to be receipts, did not fall within s. 17 (*b*) of the Registration Act, inasmuch as a receipt, unless so framed and worded as to purport expressly to limit or extinguish an interest in immoveable property (which the indorsements did not), could not come within the section, and what ordinarily operated to limit or extinguish a mortgagee's interest in the mortgaged property was not the paper receipt, but the actual part-payment of the mortgage-debt.

Held also that the indorsements did not fall within s. 17 (*c*) of the Act, inasmuch as taken by themselves they were merely memoranda made by the

* First Appeal No 133 of 1885, from a decree of Maulvi Zainul-abdin, Subordinate Judge of Moradabad, dated the 16th April, 1885.

(1) I. L. R., 1 All. 296.

mortgagee, and could not be treated as acknowledgments, nor, even if assumed to be such, did they show, upon their face, that they were acknowledgments of the receipt or payment of any consideration for the limitation or extinguishment of any interest of the mortgagee in the mortgaged property.

Held therefore that the indorsements did not require to be registered in order to make them admissible in evidence of the payments to which they related.

Mahadoji v. *Vyankaji Govind* (1), *Basawa* v. *Kalkapa* (2), *Fakir* v. *Khota* (3), *Waman Ram Chandra* v. *Dhondiba Krishnaji* (4), *Futteh Chand Sahoo* v. *Lalumber Singh Doss* (5), and *Imdad Husain* v. *Tasaddak Husain* (6), distinguished. *Dilip Singh* v. *Durga Prasad* (7), referred to.

THE plaintiffs sued the defendant for Rs. 11,905-7 due on certain bonds, claiming the sale of the immoveable property mortgaged therein. Among these bonds were bonds dated the 1st March, 1877, for Rs. 5,000, the 24th June, 1879, for Rs. 800, and the 21st March, 1881, for Rs. 2,000. These three bonds severally contained simple mortgages of immoveable property. The defendant pleaded that he had paid Rs. 5,700 in respect of these bonds, that is to say, Rs. 3,500 in respect of the first in December, 1881, Rs. 700 in respect of the second in March, 1883, and Rs. 1,500 in respect of the 3rd in July, 1882. In support of this plea he relied on certain indorsements of payment on the bonds. The indorsement on the bond dated the 1st March, 1877, was in these terms:—"Paid on the 21st December, 1881, Rs. 3,500." The indorsement on the bond dated the 24th June, 1879, was in these terms:—"Paid on the 25th March, 1883, Rs. 700." The indorsement on the third bond was in similar terms. The lower Court gave the plaintiffs a decree as claimed, holding that the defendant had not proved the payment of Rs. 5,700.

The defendant appealed to the High Court, contending that he had proved such payment. On behalf of the plaintiffs-respondents it was contended that the indorsements set out above were instruments within the meaning of s. 17, Act III of 1877, which required registration, and not being registered were inadmissible in evidence. The Court (STRAIGHT, Offg. C. J. and MAHMOOD, J.) referred the question raised by this contention to the Full Bench.

(1) I. L. R., 1 Bom. 197.
(2) I. L. R., 2 Bom. 489.
(3) I. L. R., 4 Bom. 590.
(4) I. L. R., 4 Bom. 126.
(5) 14 Moo. I. A. 129.
(6) I. L. R., 6 All. 335.
(7) I. L. R., 1 All. 142.

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IWAN ALI BEG v. BASA MAL.

The Hon. *T. Conlan* and the Hon. Pandit *Ajudhia Nath*, for the appellant.

Mr. *C. H. Hill*, Munshi *Hanuman Prasad*, and Mir *Zahur Husain*, for the respondents.

EDGE, C. J.—In this case the question arises whether certain entries, which appeared on the mortgage-bonds in suit, could be admitted in evidence, they not having been registered, it being contended that those entries or indorsements came within the provisions of clauses (*b*) and (*c*) of s. 17 of the Registration Act (III) of 1877, and were documents which affected immoveable property comprised in the bonds within the meaning of s. 49 of that Act, and that the object of tendering them in evidence was to affect immoveable property.

Now, firstly, it may be observed that there are only two of such entries or indorsements set out in the printed book, and they are set out at page 17, and read as follows:—"Paid on the 21st December, 1881, Rs. 3,500." "Paid on the 25th March, 1883, Rs. 700."

I infer that the third entry or indorsement was in similar terms.

These indorsements were found written upon the mortgage-bonds, which were produced and filed by the plaintiff. Clearly they were not instruments, receipts or acknowledgments given, or intended to be given, to the mortgagor. Taken by themselves, they could be nothing more than entries by the mortgagee as to payments of money from time to time.

Under these circumstances the first question is whether these (I wish to call them by a neutral name) entries or indorsements come within s. 17, sub-section (*b*), that is, are they "non-testamentary instruments which purport or operate to create, declare, assign, limit, or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of Rs. 100 and upwards, to or in immoveable property."

It appears to me that even if one looks at these indorsements as receipts, and even if they were receipts handed to the mortgagor, it could not be successfully contended that they were within the terms of sub-section (*b*). A receipt may certainly be framed

and worded so as to profess or purport expressly to limit or extinguish a right or interest in immovable property, in which case it would be regarded as coming within the section. But unless, on the face of them, receipts operate or purport to create, declare, assign, limit, or extinguish, in present or future, some right, title, or interest, vested or contingent, of the value of Rs. 100 and upwards, to or in immovable property, they, in my opinion, would not come within sub-section (*b*) of s. 17. The entries in the present case, assuming them to be receipts, as it is contended they are, do not, in my opinion, purport or operate to limit any such right, title, or interest. It is not contended that they purport or operate to create, declare, assign, or extinguish any such right, title, or interest.

Now, what is a receipt ordinarily beyond an acknowledgment of a payment. A receipt is not the payment. It is the actual part-payment of the mortgage-debt, and not the paper receipt, which operates to limit the interest of the mortgagee in the property in mortgage. I come therefore to the conclusion that these indorsements do not come within sub-section (*b*) of s. 17 of the Act.

Then we have to consider whether sub-section (*c*) applies to these indorsements, that is to say, whether they are "non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of the limitation or extinction of any such right, title, or interest." In support of the contention that they come within sub-section (*c*) of s. 17 of the Act, five authorities, apart from those decided by this Court, have been cited which I propose to consider *seriatim*. The first is *Mahadaji* v. *Vyankaji Govind* (1). There it was held that the document in that case did come within the section. Although the document is not set out, we have the reporter's statement as to its nature and description at page 198. As to it, Sir Michael Westropp, C. J., in his judgment, says:—"We are clearly of opinion that Exhibit 17 falls within clauses 2 and 3 of this 17th section—within clause 2, because it purports to extinguish the right, title, and interest of Qazi Muhammad in the land—and within clause 3, because it acknow-

(1) I. L. R., 1 Bom. 197.

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ledges the receipt of Rs. 350 as consideration on account of the extinction of his right, title, and interest in the land."

I should have thought it would have been impossible to have decided otherwise if the document was as it is described.

This is very different to a mere receipt or indorsements such as those in the case now being considered.

The next case is that of *Basava* v. *Kalkapa* (1). It is sufficient to say in regard to this authority that the document, though not set out, is stated in the judgment to have been tendered in evidence to prove that a mortgage had been released, and that it was expressed to that effect, so that it was in that case expressly on the face of a release of interest in immoveable property.

Next we come to the two cases reported in the 4th volume of the Bombay Series, Indian Law Reports, at pp. 126 and 590. I will deal first with the last of these cases, namely, *Faki* v. *Khatu* (2). At the bottom of page 592, the instrument or its material parts are set out. The document appears to have been a receipt, and also an acknowledgment that nothing more remained due in respect of the produce of the fields; at any rate, it in express terms referred to an interest in immoveable property, and might be held to be a declaration of a right or interest in such property, and was a totally different document from the indorsements or entries in the case now before us.

The words "your fields * * are entered in my name * * * I will cause the aforesaid two fields to be entered in your name. Nothing remains due, &c.," show plainly why the document was given, and brought it within the terms of s. 17, when used as evidence of title.

The other case is that of *Waman Ram Chandra* v. *Dhondiba Krishnaji* (3), and refers to the admissibility in evidence of an unregistered document which, as set out at page 136, was as follows:—

"Bombay, 27th May, 1874. Received from Dhondiba Crustnaji Patel the sum of Rs. 1,000 only, being in part payment of the sum of Rs. 14,000, the amount for which the said Dhondiba Crust-

(1) I. L. R., 2 Bom. 489. (2) I. L. R., 4 Bom. 590.
(3) I. L. R., 4 Bom. 126.

naji Patel has agreed to purchase the Hafiz Bagh Estate at Junnar of the widow and administratrix of the late Mr. J. C. Dickinson, deceased.—*Hearn, Cleveland, and Peile.*"

I should have thought that there could be no doubt that this receipt was an acknowledgment within the terms of sub-section (*c*).

In *Futteh Chund Sahoo* v. *Leelumber Singh Doss* (1) decided by their Lordships of Her Majesty's Privy Council, the document then in question, as far as can be ascertained from that report, was in fact an agreement for the sale of immoveable property.

Then there is a case decided by this Court (Duthoit and Mahmood, JJ.), on the 6th May, 1884—*Imdad Husain* v. *Tasadduk Husain* (2), which my brother Tyrrell informs me, after looking into the record, was very different from the one we are considering, inasmuch as the document then tendered in evidence came clearly within the purview of s. 17, as it in fact purported to extinguish an interest in immoveable property.

Such being, with the exception of the case to which I shall presently refer, the reported cases cited by Mr. *Hill* on behalf of the respondents, I think it is clear that in each of those cases the documents held to be inadmissible in evidence, because of their being unregistered, were very unlike the indorsements in the present case, and I hold that they do not affect and do not apply to the present case.

Having said so much as to the above-mentioned authorities which have been cited by Mr. *Hill*, and which I consider to be inapplicable to the present case, I come to the case of *Dalip Singh* v. *Durga Prasad* (3). It is difficult to say whether that case applies or not, as the document then in question is not set out, and I am unable to surmise what were the reasons of the learned Judges for holding that the document or acknowledgment referred to by them was not admissible in evidence by reason of its being unregistered. If it was an indorsement or entry such as is described in the present case, which, so far as I can gather, it might have been, then I must declare my dissent from that ruling.

(1) 14 Moo. I. A. 129. (2) I. L. R., 6 All. 335.
(3) I. L. R., 1 All. 442.

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Now what construction should be placed on these prohibitory and highly penal sections, which impose such serious disqualifications for non-observance of registration? The only proper answer, to my mind, is that we must see that the strictest construction be placed on them, and that the document objected to comes within the four corners of these provisions.

I have said that these indorsements are not, in my opinion, within the terms of s. 17, clauses (*b*) and (*c*), and if I might deal with the question as to what the instrument should contain, in order to be within the section, I should say that, in my judgment, an instrument to come within sub-section (*b*) must in itself purport or operate to create, declare, assign, limit, or extinguish some right, title, or interest of the value of Rs. 100 or upwards in immoveable property; and to come within sub-section (*c*), it must be on the face of it an acknowledgment of the receipt or payment of some consideration on account of the creation, declaration, assignment, limitation, or extinguishment of such an interest as is referred to.

It is perfectly obvious that the mortgagee who made these entries or indorsements did so just as any one would, who was making an entry in his private memorandum books. Taken by themselves, these indorsements are memoranda, and cannot be treated as acknowledgments. Nor do they, if they come within the meaning of acknowledgments, show that they are acknowledgments of the receipt or payment of any consideration for the limitation or extinguishment of any interest of the mortgagee in the property in mortgage.

In these cases I should be inclined to hold that the document sought to be excluded must show itself that it comes within the principle of the decision of Her Majesty's Privy Council referred to above, and I cannot believe that it was the intention of the Legislature to make compulsory the registration of memoranda or indorsements such as those in this case. Take the case which has been put to us in the course of the argument by the learned *Pandit*, and which has been elaborated by my brother Straight: say the entries or indorsements are made in the mortgagee's own account-books. Is every entry to be considered an instrument within the meaning of s. 17, and of no value as evidence without registration, although the mortgagee made the entries himself as

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memoranda? I cannot think it was intended that entries made simply to serve as memoranda should be treated as falling within s. 17 of the Act, and requring registration before being used in evidence. How, in such a case, is the mortgagor, whose interest it might be to put such entries in evidence, to get the custody of the mortgagee's books in order to have the entries registered? He probably would not even know of such entries until he obtained discovery in an action. These indorsements are not, in my opinion, within the four corners of s. 17, and therefore cannot be objected to on the ground that registration was necessary before they could be admitted in evidence.

STRAIGHT, J.— I cannot say I am altogether without doubt in regard to the question put by this reference and to what the answer to it should be. But as it has been very fully threshed out in the course of the arguments, and as the rest of the Court are quite clear upon the point, no useful purpose would be served by my delaying a reply to the reference, in order to enable me further to consider the matter.

OLDFIELD, J.—I concur with the learned Chief Justice in holding that the indorsements referred to are not such as required to be registered, in order to make them admissible in evidence.

BRODHURST, J.—I concur with the learned Chief Justice in the answer he has given to this reference.

TYRRELL, J.—I am of the same opinion as the learned Chief Justice.

1886
November 20.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Oldfield, Mr. Justice Brodhurst, and Mr. Justice Tyrrell.

NAUBAT RAM (DEFENDANT) *v.* HARNAM DAS (PLAINTIFF).*

Appeal under s. 10, Letters Patent—Limitation—Rules of practice of High Court.

It must be assumed that Rule I of the "Rules of Practice adopted by the High Court for the North-Western Provinces on the 21st May, 1873, regarding the admission of appeals under s. 10 of the Letters Patent," which provides that such appeals must be presented to the Assistant Registrar within ninety days of the judgment appealed from, had a legal origin, and was not *ultra vires* of the Court.

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* Appeal No. 2 of 1886 under s. 10, Letters Patent.