1892

MUHAMMAD NAIM-UL-LAH KHAN v. IHSAN-UL-LAH KHAN.

within the meaning of s. 591 of the Code. I concur with the learned Chief Justice that the order passed by my brother Tyrrell when he decided to amend the decree, was an order from which an appeal was excluded by Chapter XLIII of the Code, and I therefore answer the reference in the terms given by him.

1892
May 10.

APPELLATE CIVIL.

Before Mr. Justice Tyrrell and Mr. Justice Knox.

MADHO DAS (PLAINTIFF) *v.* RAM KISHEN AND OTHERS (DEFENDANTS.)*

Mortgage, equitable—Deposit of title-deeds in Calcutta—Immoveable property in mofussil—Act IV of 1882 (*Transfer of Property Act*), *s.* 59.

It is not necessary to the validity of a mortgage by deposit of title-deeds under s. 59 of the Transfer of Property Act (IV of 1882) that the property to which the title-deeds relate should be situated within the limits of one of the towns where such mortgages are allowed.

Varden Seth Sam v. *Luckpathy Royjee Lallah* (1) and *Manekji Framji* v. *Rustomji Naserwanji Mistry* (2) referred to.

This was a suit brought in the Court of the Subordinate Judge of Mirzapur by one Madho Das, against Ram Kishen, an insolvent, and the official assignee for the recovery of a sum of Rs. 135,304-12-9 with interest, and, in default of payment, for sale of certain immoveable property of the first defendant's situated in Benares, Mirzapur and Gházipur. The suit was based on an alleged equitable mortgage said to have been entered into by the defendant Ram Kishen in February 1888, by deposit of the title-deeds relating to the property in suit with the plaintiff's firm in Calcutta. Ram Kishen did not defend the suit but the official assignee appeared and pleaded, *inter alia*, that the title-deeds in question were either never voluntarily delivered by the defendant Ram Kishen to the plaintiff, but were wrongfully obtained by him, or if they were voluntarily delivered, such delivery did not

---

* First appeal No. 138 of 1890 from a decree of W. T. Martin, Esq., District Judge of Mirzapur, dated the 9th April 1890.

(1) 9 Moo. I. A., 303. (2) I. L. R., 14 Bom., 269.

take place until after Ram Kishen had been adjudicated an insolvent, and in either case their delivery could not operate to create a charge or interest in favour of the plaintiff. The suit was transferred to the Court of the District Judge of Mirzapur, and a further issue was added as to whether in any case a delivery of title-deeds in Calcutta could effectuate a valid mortgage of property in the North-Western Provinces. The District Judge, holding on the main issue in the case that the deposit of title-deeds with the plaintiff or his agents in Calcutta in February 1888, was not proved, dismissed the plaintiff's claim. The plaintiff thereupon appealed to the High Court.

Munshi *Madho Prasad* and Munshi *Jwala Prasad*, for the appellant.

The Hon. *G. T. Spankie*, Mr. *A. Strachey* and Mr. *Greenway*, for the respondents.

TYRRELL and KNOX, JJ.—We come now to the legal arguments on which the decree dismissing the suit was supported. Mr. *Strachey*, on behalf of the respondent, contended that the provisions of the third paragraph of s.59 of the Transfer of Property Act, 1882, do not apply to a case, where, as in the present, the immoveable property covered by the title-deeds is situate beyond the towns of Calcutta, Madras, Bombay, Karachi and Rangoon. The clause in question, he pressed upon us, was a saving and not an enacting clause. He allowed that the only recorded precedent which he could find on this question was against him. The case was one heard by the Sadar Diwani Adalat at Madras. That Court, it is true, refused to enforce a lien against property situate beyond the town of Madras, of which property the title-deeds had been deposited as a securety for a loan by parties living and contracting within the local limits of the Supreme Court of Madras. The principle which guided them to the refusal was that "such a transaction was not recognized" in Indian law, and they held that the principle of the English law applicable to a similar state of circumstances ought not to govern their decision. But this decision did not approve itself to their Lordships of the

1892

MADHO DAS v. RAM KISHEN.

Privy Council who reversed the decision, on the ground that the transaction was not one forbidden by law, and not being so forbidden, to refuse recognition was in the case before them a violation of justice, equity and good conscience. The case will be found reported in 9 Moo. I. A. at p. 307 and is known as the case of *Varden Seth Sam* v. *Luckpathy Royjee Lallah*. The learned counsel in dealing with this ruling laid great stress upon the fact that when the contract then under consideration was entered into, *viz.*, in the year 1851, there was no special law governing the transfer of immoveable property and no law requiring transactions affecting it to be registered. He maintained that this fact had led their Lordships to the decision at which they arrived, and that it might be fairly argued that if there had been in existence then, as now, laws regulating the transfer of property and the compulsory registration of mortgages affecting immoveable property, their Lordships would have given effect to the law and not have arrived at a contrary conclusion, regard being had to the saving clause contained in s. 59.

Positive local law now exists enacting how such contracts can and should be made, and it is a matter of public policy that the provisions of that law should be maintained and enforced. It would now be against justice, equity and good conscience to give effect to a mortgage which violated all registration rules and virtually defeated the provisions of the law. In short, a decision validating such a transaction is "opposed to the policy of the Registration Law; it would lead to evasion of stamp duty, and it is at variance with the principle of making the system of transferring land, as far as possible, a system of public transfer." This was the substance of Mr. *Strachey's* contention.

Now, it seems clear and patent to us, from the precise and positive language contained in s. 59 of the Act, that the Legislature was not only aware of transactions of the kind with which we are dealing, but proceeded of set deliberation to recognize the practice and to accord to it the full sanction of law. There is in the section not one word which forbids effect to be given to an agreement

whereby parties express their intention to create a lien on immoveable property by a mere deposit of the title-deeds as security. Moreover, it seems to us that the question where the property affected may be situate is not a matter which should affect our decision. Had it been the intention of the law that transactions of this kind should only affect immoveable property situate within the narrow circle of the Presidency Town, nothing would have been easier than to give expression to such an intention. We find nothing in the Transfer of Property Act or in the Registration Act of 1877 which forbids such a transaction. It was beyond all doubt the intention of the contracting parties in February 1888, that the deposit should operate as a hypothecation or pledge, and it would be a violation of justice and equity under such circumstances to refuse to give effect to it. As regards the rest of Mr. *Strachey's* contention, it seems to us that no greater violence is done to the Registration Law in giving effect to an equitable mortgage in respect of property in Benares than in respect of similar property in Calcutta. Our attention was directed by Mr. *Banerji*, who appeared for the appellant, to the case of *Manekji Framji* v. *Rustomji Naserwanji Mistry* (1) in which upon another question the Bombay High Court recognized a deposit in the town of Bombay of title-deeds affecting property situate outside the limits of that Presidency Town as effecting a legal mortgage falling within the provisions of s. 59 of Act IV of 1882.

This case is valuable as showing that the deposit of title-deeds of property lying outside a Presidency Town operating as a legal mortgage is recognized and given effect to in Presidency Towns. We are, therefore, unable to accede to Mr. *Strachey's* contention, and we agree with the decision at which the lower Court arrived when dealing with this point.

The suit and the appeal are decreed with costs in both the Courts.

Appeal allowed.

(1) I. L. R., 14 Bom., 269.