

## APPELLATE CIVIL.

Before Mr. Justice Sulaiman and Mr. Justice Kendall.

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BANK OF UPPER INDIA, LIMITED (IN LIQUIDATION)  
(PLAINTIFF) v. FANNY SKINNER AND OTHERS  
(DEFENDANTS).\*

Act No. IV of 1882 (Transfer of Property Act), section 54—  
Act No. X of 1897 (General Clauses Act), section 3,  
clause (25)—“Immoveable property”—Mortgagee’s in-  
terest under a simple mortgage—Assignment of mort-  
gagee’s interest without registered document—Estoppel.

The interest of a simple mortgagee is immoveable property, as defined by the General Clauses Act, 1897, and within the meaning of the provisions of the Transfer of Property Act; and a transfer of such interest can only be effected by means of a registered instrument, as required by section 54 of the Transfer of Property Act.

The parties to an arrangement for the assignment of such an interest by the one to the other without the execution of a registered instrument may, where the arrangement is carried out and acted upon, themselves be estopped from going behind it, but that arrangement cannot be effective as a legal transfer so far as third parties are concerned.

*Mutsaddi Lal v. Muhammad Hanij* (1), *Paresh Nath Singha v. Nabogopal* (2) and *Nataraja Iyer v. The South Indian Bank of Tinnevely* (3), referred to. *Abdul Majid v. Muhammad Faizullah* (4), *Karim-un-nissa v. Phul Chand* (5) and *Lal Umrao Singh v. Lal Singh* (6), distinguished.

THE facts of the case are fully stated in the judgment of the Court.

Mr. B. E. O’Conor and Munshi Ram Nama Prasad, for the appellant.

Dr. Kailas Nath Katju and Babu Surendra Nath, Gupta, for the respondents.

\* First Appeal No. 278 of 1926, from a decree of J. N. Mushran, Subordinate Judge of Meerut, dated the 18th of February, 1926.

(1) (1912) 10 A.L.J., 167.

(2) (1907) I.L.R., 29 Cal., 1.

(3) (1911) I.L.R., 37 Mad., 51.

(4) (1890) I.L.R., 13 All., 89.

(5) (1898) I.L.R., 15 All., 134.

(6) (1924) I.L.R., 46 All., 917.

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SULAIMAN and KENDAL, JJ. :—This is a plaintiff's appeal arising out of a suit for sale on the basis of a mortgage-deed, dated the 8th of December, 1911, executed by defendant No. 1 in favour of the Bank of Upper India. In the original written-statement which was filed by the principal contesting defendant on the 17th of July, 1924, she raised various pleas including a denial of proper execution, receipt of consideration as well as some other pleas. But there was no plea that the plaintiff Bank had no *locus standi* to sue through its liquidator. On the 10th of November, 1925, she filed an application stating that she had just come to know that the Bank of Upper India had sold all its assets and liens to the Trust of India and that accordingly the plaintiff had no right left to sue the defendant. In spite of objections the court considered that this was a legal plea and framed an additional issue, No 8. All the other issues have been found in favour of the plaintiff, but the suit has failed on the ground that the assets of the Upper India Bank had been transferred to the Trust of India, Limited, and the plaintiff Bank cannot maintain the suit. The finding on the last mentioned issue is the only point which has been discussed before us by the learned counsel for the parties.

The principal facts of this case cannot be disputed. The Bank of Upper India suspended payment sometime about October, 1914. In 1915 an application was presented under section 153 of the Indian Companies Act, putting forward a compromise before the High Court for approval. On the 2nd of June, 1915, TUDBALL, J., sanctioned a scheme under which the shareholders were to surrender their shares and receive in exchange debentures in the Trust of India, on certain conditions. Later, on the 28th of February, 1917, that scheme was slightly modified and the learned Judge accepted the modification. The true banking business of

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the Bank of Upper India was to be absorbed and taken over by the Alliance Bank of Simla and that portion of the Bank's business which was not true banking was to be taken over by a company called the Trust of India, Limited. In lieu of their shares the shareholders were to be offered debentures in the Alliance Bank and preference shares in the Trust of India, Limited, on certain terms. It is not necessary to specify the scheme in any detail.

On the 30th of June, 1917, the shareholders of the Upper India Bank at their meeting resolved that the company should be wound up voluntarily, and Messrs. Hunter and Stuart be appointed liquidators for its winding up, with joint and several powers. It was further resolved that a draft agreement with the Trust of India, Limited, should be approved, and the liquidators be authorized pursuant to section 213 of the Indian Companies Act of 1913 to enter into the said agreement with the Trust of India, Limited, in terms of the said draft, and to carry the same into effect with such if any modifications, as they may think expedient. Subsequently the Alliance Bank of Simla and the Trust of India, Limited, also went into liquidation. Presumably with a view to evade the payment of stamp duty to Government, the liquidators of the Upper India Bank and those of the Alliance Bank and the Trust arrived at some mutual and private understanding that the debentures and the preference shares should be offered to the shareholders of the Upper India Bank and that the assets of the latter Bank be taken over by the liquidators of the Alliance Bank and the Trust. As to documents which were outstanding the understanding was that the liquidators of the Upper India Bank should realize the same and pay over the amount realized to the other liquidators. The oral evidence in this case leaves no doubt that this mutual arrangement has been carried out to a very great extent.

and that as between these two sets of liquidators there has been absolutely no breach of contract so far. But it is also an admitted fact that the liquidators of the Upper India Bank have not executed any proper registered document transferring their interests in the immoveable properties in favour of the other liquidators. At any rate it is admitted in this case that no registered document transferring the rights under the mortgage in suit has been executed by the liquidators of the plaintiff Bank. The learned Subordinate Judge, relying principally on a judgement of the High Court in a previous proceeding,\* has come to the conclusion that the assets of the Bank have all been legally transferred to the Trust of India. In that case the question arising in the present appeal did not directly arise. The learned Subordinate Judge has quoted expressions used by WALSH, J., as to the taking over of the assets of the Bank of Upper India, the transactions having been carried through, the shareholders of the Bank of Upper India having surrendered their shares in exchange for debentures and preference shares and the due execution and performance of the agreement for sale. There is a further remark in his judgement to the effect that "the exchanges have been made, the matters have passed into history and the legal rights of the parties have been settled without the necessity of a formal document". RYVES, J., however, confined his judgment exclusively to the question of estoppel and remarked: "It may be that the parties *inter se* are estopped from disputing the transfer although in law no valid transfer has taken place so far as immovable properties or securities on such immoveable properties of over Rs. 100 in value are concerned." The defendant not being a party to that proceeding, it is not suggested that that judgement operates as *res judicata*. As the question at that time was principally one of estoppel, we

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do not think that it was at all decided in that case that a valid transfer of all the immoveable properties had been legally effected.

If no registered document is required for the transfer of the mortgagee's interest under a simple mortgage-deed, and an oral assignment is effective, then there would be no doubt that the plaintiff Bank has parted with its interest in this mortgage by virtue of the arrangement with the liquidators of the other company. On the other hand, if no valid transfer can take effect without a registered document, it is clear that although the parties to the arrangement may themselves be estopped from going behind it, that arrangement cannot be used as transferring legal title to the Trust when a stranger, who is not a party to that agreement, wishes to take advantage of it.

Section 17, sub-clause (b), of the Registration Act makes "all 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" compulsorily registrable. It is obvious that if a sale-deed of the mortgagee's interest had been executed it would have required registration inasmuch as it would have affected an interest in immoveable property. But, strictly speaking, section 17 requires registration only when a transaction has been reduced to writing. It does not in terms lay down that no transfer can take effect in the absence of such document. We have to fall back upon the provisions of the Transfer of Property Act to see whether to effect a valid transfer a registered instrument is necessary. Section 58, clause (a), makes it quite clear that a mortgage is a transfer of an interest in immoveable property. Then section 54 provides that a transfer of tangible immoveable property of the value of Rs. 100 and

over or other intangible thing can be made only by a registered instrument. The question remains whether the mortgagee's interest is itself immoveable property within the meaning of section 3. That section, however, does not give a complete definition of immoveable property. For that we have to refer to its definition in the General Clauses Act (Act No. X of 1897) clause (25), where it is laid down that immoveable property shall include land, benefits to arise out of land and things attached to the earth or permanently fastened to anything attached to the earth. Even that definition on its own language is not exhaustive. A subtle distinction has sometimes been drawn between an interest in the immoveable property and the immoveable property itself. And on the basis of such a distinction the learned advocate for the respondent has urged that although a mortgagee's interest is an interest in immoveable property it is not immoveable property itself, and therefore a transfer of it does not require a registered deed. We are unable to accede to this contention.

In the first place a mortgagee's interest may come in within the meaning of the expression "benefits to arise out of land" in the General Clauses Act. In the second place, the Indian legislature appears to have intended that all rights to immoveable property should fall within the category of immoveable property. Mortgages of immoveable property have priority over all subsequent transfers and subsequent transferees are presumed to have notice of the previous charge. Such presumption cannot be made unless there is a registered document. It seems to be against the general policy of the Transfer of Property Act that subsequent transferees should be bound by a mortgage although that mortgage need not be made by a registered instrument. The mortgagee's interest is not a mere right to recover the debt due but to have a charge on the property and to follow it

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wherever it goes. His claim is excluded from the definition of actionable claim in section 3 of the Transfer of Property Act. We have therefore no hesitation in coming to the conclusion that a sale of a mortgagee's interest can only be effected by means of a registered deed of transfer.

CHAMBER, J., in the case of *Mutsaddi Lal v. Muhammad Hanif* (1), expressed the opinion that the interest of a simple mortgagee was an intangible thing within the meaning of section 54 and the transfer of it can be made only by a registered instrument. The Calcutta view also is that the mortgagee's interest is immoveable property even within the meaning of the provisions of the Civil Procedure Code: *Paresh Nath Singha v. Nabogopal* (2). The same view has been expressed in Madras: *Nataraja Iyer v. The South Indian Bank of Tinnevely* (3).

No doubt in numerous cases of this Court, for instance *Abdul Majid v. Muhammad Faizullah* (4), *Karim-un-nissa v. Phul Chand* (5) and *Lal Umrao Singh v. Lal Singh* (6), it has been held that a simple mortgagee's interest is not immoveable property within the meaning of that word as used in the Code of Civil Procedure. As the latter Code does not define immoveable property, the learned advocate for the respondent has urged that these cases must have proceeded on the definition of that word in the General Clauses Act, which definition applies to the case before us. But there are various provisions in the Code of Civil Procedure which make it impracticable to hold that the interest of the mortgagee can be attached and sold as immoveable property according to the procedure laid down for its sale. Those considerations influenced the learned Judges of this Court considerably. We do not therefore think

(1) (1912) 10 A.L.J. 167.

(2) (1901) I.L.R., 29 Cal., 1.

(3) (1911) I.L.R., 37 Mad., 51.

(4) (1890) I.L.R., 13 All., 89.

(5) (1893) I.L.R., 15 All., 134.

(6) (1924) I.L.R., 46 All., 917.

that these cases are any guide to us in the present case. The view expressed by us as above maintains a consistency between the policies of the Registration Act and the Transfer of Property Act, and is we think, the correct view.

No matter what the equities may be between the Bank of Upper India and the Trust of India, Limited, *inter se*, we must hold that no valid and legal transfer of the mortgagee's interest had taken place so as to deprive the present plaintiff of all rights to maintain the suit.

We accordingly allow this appeal and setting aside the decree of the court below decree the plaintiff's claim with costs in both courts. The usual six months are allowed for payment.

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### REVISIONAL CIVIL.

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*Before Mr. Justice Sen and Mr. Justice Niamat-Ullah.*

JAGANNATH SAHU (PLAINTIFF) v. CHHEDI SAHU  
(DEFENDANT).\*

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*Civil Procedure Code, schedule II, paragraph 5—Arbitration—Appointment of fresh arbitrator when original arbitrator refuses to act—Procedure—Court appointing arbitrator on remuneration, without parties' consent—Civil Procedure Code, section 115—"Case decided"—Order appointing fresh arbitrator.*

The parties to a suit agreed to refer the dispute to the arbitration of a named arbitrator. An order of reference was made accordingly, but the arbitrator declined to act. The defendant then applied to the court that anyone out of nine persons nominated by him might be appointed as arbitrator. The plaintiff was no longer willing to have the case decided by an arbitrator and prayed that the arbitration be superseded. Thereupon the court appointed a certain person as arbitrator,