

FULL BENCH.

1880
August 12.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Oldfield, and Mr. Justice Straight.

IN THE MATTER OF THE PETITION OF SHEO DIAL AND ANOTHER (PLAINTIFFS) *v.* PRAG DAT MISR AND ANOTHER (DEFENDANTS).*

Unregistered bond hypothecating immoveable property as collateral security—Admissibility of bond as evidence of the Money-obligation—Effect of Non-registration—Act III of 1877 (Registration Act), ss. 17, 49.

A bond whereby a person obliges himself to pay money to another, and at the same time hypothecates immoveable property as collateral security for such payment, although the money-obligation is of the value of one hundred rupees and the bond is not registered, can be received in evidence in support of a claim to enforce the money-obligation.

THE plaintiffs in this suit claimed Rs. 217-10-0, principal moneys and interest, on an unregistered bond, bearing date the 7th August, 1878. The material part of this bond was as follows:—"Bond executed by (defendants) of Manya Chak Delawal, tappa Chappia, pargana Rasulpur Gaus, in the district of Basti: we have of our free will and consent borrowed Rs. 199 of the current coin from (plaintiffs)..... we shall pay that amount without objection or pretext with interest at the rate of Rs. 9 per cent. per annum within one year: we have created an incumbrance on our share in the said mauza for this money, hypothecating it: as long as we do not pay the principal amount with interest in a lump sum, we shall not alienate the share by sale or mortgage, but will keep it in our possession: we have therefore executed this hypothecation-bond that it may stand as evidence." The plaintiffs did not seek to enforce the hypothecation contained in the bond, by reason that the bond was unregistered. The Court of first instance, deciding the suit on the merits, gave the plaintiffs a decree for the amount claimed, with interest at the rate stipulated in the bond for the period during which the suit was pending. On appeal by the defendants the lower appellate Court held that the bond, being unregistered, was not admissible in evidence, and dismissed the suit. Its reasons for so holding were as follows:—"The High

* Application, No. 24B. of 1880, for revision under s. 622 of Act X of 1877 of a decree of H. G. Currie, Esq., Judge of Gorakhpur, dated the 12th December, 1879.

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Court rulings of Calcutta and the North-Western Provinces; antecedent to 1872, and with reference to the late Act VIII of 1871, and its predecessors, laid down that the document could be received in evidence of the loan transaction, but not as affecting the hypothecated property, and that a decree for the money alone could be procured on the unregistered bond. This bond is, however, under the new Act III of 1877, and the only Full Bench High Court decision I know of, or which can be shown—*Matangini Dossi v. Ramnarain Sadkhan* (1)—takes the other, and what I have always thought the correct view, that, unless the bond is distinctly divisible, a bond and a separate mortgage is not, in fact, an ordinary money-loan mortgage-bond, that document must be registered to make it valid, for any purpose affecting the loan, or the hypothecated property, and that, without being registered, it is so much waste paper. The bond in this case is no more divisible, or relating to more than one transaction, than the bond in the case quoted above; and the bond, not being registered, cannot be accepted as evidence at all relating to any part of the transaction." The plaintiffs applied to the High Court, under s. 622 of Act X of 1877, to revise the proceedings of the lower appellate Court on the ground (i) that its action in refusing to admit the bond as evidence of the claim for money was illegal; (ii) that in refusing to admit the bond in evidence the lower appellate Court had acted contrary to the provisions of Act I of 1872; and (iii) that the lower appellate Court should have taken into consideration the other evidence on the record.

The Division Bench before which the application came for hearing (PEARSON, J., and OLDFIELD, J.,) referred it to the Full Bench for disposal.

Munshi *Kashi Prasad* and Maulvi *Mehdi Hasan*, for the petitioners, plaintiffs.

Munshis *Hanuman Prasad* and *Sukh Ram*, for the defendants.

The following judgments were delivered by the Full Bench:

STUART, C. J.—In this case the plaintiffs sue to recover Rs. 217-10-0, principal and interest due under a bond dated 7th August, 1878. The bond purports to hypothecate immoveable

(1) I. L. R., 4 Calc., 83.

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property, but not being registered is not evidence to that effect, and this is admitted by the plaintiffs, for in their plaint they, for that reason, waive their rights of hypothecation. The suit therefore was simply to recover the money on the personal covenant in the bond. The Munsif decreed the amount, but the Judge reversed his decree, holding that the bond could only be regarded as a bond with hypothecation which could not be separated from the money obligation, and he cited in support of this opinion *Matangini Dossi v. Ram Narain Sadkhan* (1).

From the decision of the Judge, however erroneous, there was, under s. 586 of the Civil Procedure Code, no second appeal to this Court, and the case therefore comes before us by application for revision under s. 622 of the Procedure Code, which clearly applies.

We have therefore to consider whether the Judge was right, and, if we consider he was in error, to make such order as we think fit. There cannot be a doubt that the Judge took a wholly erroneous view of the case. He misread the bond, mistaking it for an instrument in which the hypothecation of the immoveable property was inseparable from the personal covenant; and on the authority of the Calcutta case, which he cites in his judgment, he held that the bond, being unregistered, could not be received in evidence for any purpose; and no doubt, if the Judge's view of the legal character of the bond was right, the Calcutta case to which he refers was a direct authority, although, for so plain a proposition as that an unregistered bond of hypothecation of the value in this suit could not be received in evidence, no decided case or other legal authority was needed.

In the present case, however, the personal covenant in the bond is distinctly divisible or separable from its hypothecating clauses, and so regarded the bond is clear evidence of the debt. A very distinct ruling to this effect by this Court was referred to at the hearing,—*Seeta Kalwar v. Jagar Nath Parshad* (2). Another Calcutta case was referred to, which, however, has only an indirect application to the case before us,—*Nundo Kishore Lall v. Ramsookhee Kooer* (3). There the question was one of limitation, it being

(1) I. L. R., 4 Calc., 83. (2) H. C. R., N.-W. P., 1868, p. 170.

(3) I. L. R., 5 Calc., 215.

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held that, "although the document is not admissible as evidence in respect of any question relating to the property conveyed by it, still it may be good evidence between the parties for any other purpose;" and it appears to have been further held that, although under the Registration Act an unregistered instrument affecting property of the necessary value could not be received in evidence against the property, such a provision does not prevent the instrument being used for the purpose of showing that a fresh period of limitation has been acquired in respect to the instrument being an acknowledgment of a debt in writing. This case, however, does not appear to me to have any very direct bearing on the question before us; but the case decided by this Court in 1868 to which I have referred is a distinct authority, if authority was wanting in so plain a case as the present.

The case should therefore go back to the Judge for decision on its merits, and, in disposing of these merits, he should take evidence of the making of the bond, the execution of which is denied by the defendants. But should the Judge hold that the bond has been proved, he will admit and apply it as evidence of the debt sued for.

OLDFIELD, J.—The instrument in question cannot under the terms of s. 17 of the Registration Act "affect any immoveable property comprised therein," or "be received as evidence of any transaction affecting such property;" but there is nothing in the section to prevent its being received in evidence of the debt to which it refers. The bond imposes a personal liability for the debt on the obligor, and also effects a mortgage of the property, and the two transactions are distinct. The instrument may be received in evidence of the former though not of the latter transaction. The distinction has been uniformly recognized by this Court. The case should be remanded to the lower appellate Court for disposal on the merits. Costs to follow the result.

STRAIGHT, J.—In my opinion, the Judge was in error in refusing to receive the unregistered bond as evidence of the personal debt due from the defendants to the plaintiffs. The case referred to by him—*Matangini Dossi v. Ramnarain Sudkhan* (1)—was decided

(1) I. L. R., 4 Calc., 83.

upon the special language of the document involved in the suit before the Court; and Garth, C. J., remarked that "it was doubtful whether, having regard to the terms of the loan, the defendant was personally liable for the money, and whether the only remedy of the plaintiff was not against the mortgaged property." But in the present case the bond creates a personal as divisible from a property obligation, and the loan can be separated from the hypothecation. The suit was simply for the money-debt and not for enforcement of lien, and the bond was not tendered in evidence for the purpose of proving a "transaction affecting property," but in order to establish that the loan had been made. The Judge should therefore dispose of the case upon the merits, and the case should be remanded for that purpose. Costs of the application to be costs in the cause. I may add that after discussion the pleader for the opposite party abandoned his contention, contrary to the view I have expressed as untenable.

PEARSON, J.—I concur in the opinion expressed by Mr. Justice Straight, and would remand the case to the lower appellate Court for fresh disposal, with a direction that the costs of this application be costs in the cause.

Case remanded.

APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Straight.

MANNU LAL (DEFENDANT) v. HARSUKH DAS (PLAINTIFF).*

Attachment in execution of decree—Suit to establish right.

B caused certain immoveable property to be attached in the execution of a decree. *M* objected to the attachment, claiming to be in possession of such property on his own account. The investigation of such claim which followed under s. 246 of Act VIII of 1859 took place as between *B*, the decree-holder, and *M*, *N*, the judgment-debtor, not being a party to it except in name. *M*'s objection was allowed in May, 1871, but no suit was brought either by *B* or *N* to establish *N*'s right to such property. *H* subsequently obtained a decree against *N* in 1877, and in

* Second Appeal, No. 267 of 1880, from a decree of H. A. Harrison, Esq., Judge of Mirzapur, dated the 10th January, 1880, reversing a decree of Kazi Wajeh-ul-lah Khan, Subordinate Judge of Mirzapur, dated the 30th June, 1879.

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