

1934.

March,
6. 7.

APPELLATE CIVIL.

Before Wort and Dhavle, JJ.

ABDUL LATIF

v.

DEBI MAHTON.*

Registration Act, 1908 (Act XVI of 1908), sections 17 and 49—Registration Amendment Act, 1927 (Act II of 1927), section 2—Explanation, whether applies to contracts in which lien is specially created—deed of contract for sale, whether requires registration—unregistered deed containing two provisions, one “affecting immovable property”, and the other mere agreement to sell—suit for specific performance—plaintiff, whether can rely on that part of document only which relates to such agreement—construction—Transfer of Property Act, 1882 (Act IV of 1882), section 55, applicability of.

The *Explanation* added to section 17 of the Registration Act, 1908, by the amending Act II of 1927, says :—

“ A document purporting or operating to effect a contract for the sale of immovable property shall not be deemed to require or ever to have required registration by reason only of the fact that such document contains a recital of the payment of any earnest money or of the whole or any part of the purchase money.”

Held, that the *Explanation* does not deal with those contracts in which a lien has been specifically created.

Dayal Singh's(1) case, therefore, is still an authority for the proposition that a specific charge created in a contract “affects” immovable property within the meaning of section 49 of the Act.

Section 55 of the Transfer of Property Act applies only to those cases in which the ownership of the property has passed to the purchaser.

Where in an unregistered document there are two distinct provisions, one creating a charge or mortgage and requiring registration and the other being an agreement for

* Appeal from Appellate Decree no. 852 of 1931, from a decision of R. B. Beavor, Esq., I.C.S., District Judge of Saran, dated the 2.th January, 1931, reversing a decision of Maulavi Nasimuddin Ahmad, Munsif of Chapra, dated the 28th January, 1930.

(1) (1926) L. R. 53 I. A. 214.

sale not requiring registration, there is nothing to prevent the plaintiff, in a suit for specific performance wherein the charge or mortgage is not sought to be enforced, from relying on that part of the document which purports to be a mere agreement to sell.

Vyavan Chetti v. Subramanian Chetti(1), followed.

Skinner v. Skinner(2), explained.

Where a contract for sale recited :

“ On receipt of Rs. 300 in cash in one instalment in one lump sum from the hand and asset of..... I do execute this deed of contract and make a trustworthy declaration that I shall within three months execute and get registered a deed of sale in respect of the land entered in this deed of contract..... I the declarant mortgaged, hypothecated and pledged the land entered in this deed of contract, so that should I execute any deed of any kind whatsoever, deed of sale, rehan, etc., in respect of the land entered in the deed of contract, the same shall be treated as null and void and inoperative

Held, on a construction of the document, that the clause relating to “ mortgage, hypothecation and pledge ” was neither intended to operate nor did it actually operate as a mortgage or charge : the document was no more than what it purported to be, namely, a deed of agreement for sale, and the clause was merely intended to operate as a covenant against encumbering or selling the property to another.

Appeal by the plaintiff.

The case was in the first instance heard by Macpherson, J. who referred it to the Division Bench by the following Order of Reference :—

MACPHERSON, J.—The plaintiff-appellant sought specific performance of a contract of sale for Rs. 750 and failing that a decree for Rs. 300 which he had paid in advance, with damages represented by interest thereon at the rate of rupee one per month.

The first Court decreed specific performance. Upon appeal the learned District Judge held that the deed of contract Exhibit 1 was inadmissible in evidence for lack of registration since in addition to the contract of sale and statement of the payment of Rs. 300 it contains the following provision as officially translated :—

“ And I, the declarant, mortgaged, hypothecated and pledged the land entered in this deed of contract, so that should I execute any deed of any kind whatsoever,

(1) (1920) I. L. R. 43 Mad. 660; L. R. 47 I. A. 188.

(2) (1929) L. R. 56 I. A. 363.

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deed of sale, reban etc. in respect of the land entered in the deed of contract, the same shall be treated as null and void and inoperative. I have, therefore, given these few words in writing by way of the deed of contract so that the same may be of use when required."

which makes it a document, to wit, a mortgage, requiring registration under section 17 of the Registration Act. He went on, however, to hold that though Exhibit I was inadmissible to prove the contract of sale, it was admissible as a receipt for the sum of Rs. 300 and upon consideration of all the evidence to find in favour of the execution of Exhibit I by the defendant and the payment to him of Rs. 300 as part of the sale price and, specific performance of the contract being inadmissible, to pass a decree in favour of the plaintiff for Rs. 300 only with proportionate costs.

The second appeal is preferred against the refusal to direct specific performance and the defendant has filed a cross-objection in respect of the sum of Rs. 300 on the plea that "when the appellate court had held that the document Exhibit I was inadmissible in evidence it was wrong to hold that any portion of the recital therein contained was admissible for any purpose whatsoever."

Mr. Husnain's two points are, first that there is no mortgage, hypothecation or pledge so that Exhibit I was not compulsorily registered; and, secondly, that in any event he is entitled to prove the portion of Exhibit I which is not compulsorily registrable.

I would hold against him on the construction of Exhibit I.

As to the admissibility in evidence of Exhibit I, it is clear that if there had been no stipulation as to 'mortgage, hypothecation and pledge', it would have been admissible in evidence without registration by virtue of Act II of 1927. Not only is the *explanation* introduced thereby after section 17, clause (iii), of the Indian Registration Act, 1908, retrospective but Exhibit I is subsequent in date to Act II of 1927. On the other hand Act XXI of 1929 which by section 10(3) added the proviso to section 49 of the Indian Registration Act, came into force on 24th December, 1929, and the proviso would seem to be inapplicable under section 15 of the Act of 1929 [*Dharichchan Singh v. Mahabir Singh*(1)]. It is urged on behalf of the appellant that, assuming that the second part of Exhibit I constitutes a mortgage, nevertheless, as he is only seeking specific performance and is not here relying upon the mortgage, Exhibit I is admissible for his purpose though it might be inadmissible as a mortgage. He relies upon the Privy Council decision in *Vyaran Chetti v. Subramanian Chetti*(2). On behalf of the respondent reliance is placed upon *Skinner v. Skinner*(3). That case was decided subsequent to the date when appellant's suit was filed and before the amendment to section 49 of the Indian Registration Act. The decision was that a sale-deed, which is required to be registered, will, if unregistered, be under section 49 inadmissible in evidence in a suit for specific performance of the agreement to transfer said to be contained therein. A slight distinction between that case and the present instance may be found in the fact that the portion

(1) (1933) 14 Pat. L. T. 628.

(2) (1920) I. L. R. 43 Mad. 660; L. R. 47 I. A. 188.

(3) (1929) L. R. 56 I. A. 368.

of Exhibit I which is compulsorily registrable is merely alongside the portion thereof which it is sought to adduce in evidence. But their Lordships lay stress on the fact that the unregistered document which was compulsorily registrable "is not to affect" the property, and it is not to be received as evidence of any transaction "affecting" the property.

The point is one which is likely to come up fairly frequently for decision and I am of opinion that it should be determined by a Bench.

Let the appeal and cross-objection be referred to a Bench of two Judges under proviso (a) to rule 1, Chapter II, of the High Court Rules.

On this reference—

Khurshed Husnain (with him *Syed Ali Khan* and *J. C. Sinha*), for the appellants.

Hareshwar Prasad Sinha, for the respondents.

WORT, J.—This case has been referred to a Division Bench for decision.

The question which arises is whether an unregistered agreement for sale is admissible in evidence in an action for specific performance. The learned Judge in the court below reversing the decision of the trial Court came to the conclusion that it was inadmissible in the plaintiff's suit.

In dealing with the matter two principal questions will have to be considered, one is the construction of the agreement itself and the other the provisions of the Indian Registration Act, sections 17 and 49. Under section 17 of the Indian Registration Act certain documents are required to be registered amongst which will be the agreement before us if it is to be construed as a conveyance, in contradistinction to a mere agreement for sale of the property concerned. One of the exceptions to the requirements which I have mentioned is found in sub-section (2), clause (v), which provides—

"Any document not itself creating, declaring, assigning, limiting or extinguishing any right, title or interest, etc., but merely creating a right to obtain another document which will, when executed, create, declare, assign, limit or extinguish any such right, title or interest."

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Section 49, as is well known, provides that a document which is required to be registered under section 17 shall not "affect" any immovable property and shall not be received in evidence if it is unregistered. By the proviso enacted by Act XXI of 1929 an unregistered document affecting immovable property required by the Act or the Transfer of Property Act to be registered may be received as evidence of a contract in a suit for specific performance.

One of the questions which might have arisen in this case, had the view which I hold been different, would have been whether the proviso which I have just read is to be considered as retrospective.

The agreement which was dated the 15th February, 1928, after certain recitals states

"And also with the advice of and in consultation with my well-wishers fixed the price for the absolute sale of 11 kathas and 16½ dhurs of bakasht land as per details given below lying in mauza Musahri, etc."

It then states the price and adds—

"On receipt of Rs. 300 in cash in one instalment in one lump sum from the hand and asset of Abdul Latif Mian, etc. I do execute this deed of contract and make a trustworthy declaration that I shall within three months execute and get registered a deed of sale in respect of the land entered in this deed of contract."

There is nothing in the agreement which would in any way modify or affect the provision which I have just read, namely, that the vendor undertook that within three months he should get registered a deed of sale, and it is not seriously disputed that the agreement comes within the exception provided by sub-section (2), clause (v), of section 17 of the Indian Registration Act. But it is by reason of some of the final clauses in the agreement that it is argued that the agreement required registration as "affecting" immovable property. The provision referred to is to this effect—

"I the declarant mortgaged, hypothecated and pledged the land entered in this deed of contract, so that should I execute any deed of any kind whatsoever, deed of sale, rehan, etc., in respect of the land entered in the deed of contract, the same shall be treated as null and void and inoperative. I therefore give these few words in writing, etc."

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It is contended by the respondent that these clauses affect the immovable property either as a charge or mortgage. The learned Judge in the trial court treated this clause as collateral and in fact redundant, to use his words. It seems to me quite clear, although the construction of that clause is not without considerable difficulty, that it can be treated as a charge in respect of the earnest money which was paid on account by the purchaser, as is contended by the learned Advocate on behalf of the respondent. It clearly does not come within the definition of 'charge' given in section 100 of the Transfer of Property Act and it seems to be very clear that it cannot be construed as a mortgage although that word is used in one of the clauses to which I have referred. It is a matter of considerable difficulty to place a grammatical construction upon the clauses, but, after careful consideration it seems to me to be reasonably clear that what the vendor intended was to enter into a covenant similar to a covenant which is usually found in deeds of this kind against incumbering or selling the land, after having once sold it to the purchaser under the agreement.

Mr. Khurshed Husnain, who appears on behalf of the appellant, relied upon a decision of the Judicial Committee of the Privy Council in *Vyavan Chetti v. Subramanian Chetti*⁽¹⁾. Reliance has been placed upon this authority on the assumption that the argument of the learned Advocate who appears on behalf of the respondent is well founded that the clauses to which I have just referred in fact and in law "affect" immovable property.

The matter under consideration in the case before their Lordships of the Judicial Committee [*Vyavan Chetti v. Subramanian Chetti*⁽¹⁾] was an agreement by a mortgagee of a certain property. One clause in particular had to be construed and Lord Buckmaster

(1) (1920) I. L. R. 43 Mad. 660, L. R. 47 I. A. 188.

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in delivering the opinion of the Judicial Committee made these observations—

“ The clause is open to two interpretations. It may be that the provision that the rights, both prior and subsequent, should stand on the footing of equality, is explained and limited by the following words, which state that the amounts of realisation shall be divided and appropriated in equal halves, or it may mean that two separate and distinct results are effected by the clause : first, that the rights should stand on a footing of equality; and, secondly, that the proceeds should be equally divided. Whichever interpretation is taken there is no objection to the lack of registration in such proceedings as those out of which this appeal has arisen, for, if the whole effect of the agreement is to provide merely that the realised money is to be divided in equal shares, then there is nothing in this agreement which requires to be registered, and if, on the other hand, there are two distinct provisions, the one relating to rights of property and the other with regard to the division of the realisation moneys then, as these proceedings relate merely to the question of the realised money, it need not be registered for the purpose of being given in evidence in this suit ”; in other words, their Lordships construed the separate clauses, assuming that they were separate clauses dealing with separate rights, and that in enforcing the one to which the Registration Act did not apply, the document by which these rights were affected was admissible in evidence.

It is said, therefore, that that part of the contract which was merely an agreement for sale of the property was an undertaking to execute and register a deed of sale and consequently that part is admissible in evidence in this suit for specific performance. The respondent, however, relies on the case of *Dayal Singh v. Indar Singh*(¹). In that case the appeal

(1) (1926) L. R. 53 I. A. 214.

arose out of an action for specific performance. An agreement for sale of the property was before their Lordships for consideration and the question which was raised was, whether the agreement was in effect a conveyance of property or whether it was a mere contract coming within the exception in section 17 of the Registration Act, sub-section (2), clause (v), and their Lordships expressed their opinion in these words :—

“ They will assume without deciding that taking the terms of the Act of 1877 alone the judgments of the courts below were right in holding that the present agreement was an agreement to sell and not a sale, and was consequently exempted under section 17, sub-section (2), clause (v), which corresponds with section 17(h) of 1877.”

But they went on to say that a point had escaped the attention of the courts below. They referred to section 55 of the Transfer of Property Act and went on to hold that by reason of that section the lien which was created affected immovable property and, therefore, did not allow of the application of section 17, sub-section (2), clause (v).

It is difficult to understand the decision of their Lordships after a consideration of section 55 of the Transfer of Property Act which on its very words apply only to those cases in which the ownership of property had passed to the purchaser, and if, as their Lordships assumed, the agreement came within the exception in section 17 of the Registration Act, then it was an agreement under which the ownership of the property had not passed to the purchaser and, therefore, could not come under section 55 of the Transfer of Property Act. The effect of this decision however has been dealt with by section 2 of the Indian Registration Amendment Act II of 1927 which is to the effect that

“ A document purporting or operating to effect a contract for the sale of immovable property shall not be deemed to require or ever

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It was by reason of the fact that a part of the purchase money had been paid in *Dayal Singh's*(¹) case that their Lordships held that the lien arose by the operation of section 55 of the Transfer of Property Act. The *Explanation* which has been added is clearly retrospective but equally clearly does not deal with those contracts in which a lien has been specifically created as the words of the *Explanation* are

"by reason only of the fact that such document contains a recital of the payment of any earnest money."

Dayal Singh's(¹) case, therefore, will still be an authority for the contention that a specific charge created would affect immovable property within the meaning of section 49 of the Registration Act. But as I have said the answer of the appellant to this is the case of *Vyavan Chetti v. Subramanian Chetti*(²).

There is a further decision of the their Lordships of the Judicial Committee in the case of *Skinner v. Skinner*(³). Reliance was placed upon this case by the respondent. There again it was an action for specific performance and in construing the agreement their Lordships came to the conclusion that it was an instrument which affected immovable property, and therefore was registrable, and could be received in evidence. Particular reliance has been placed upon the observations made towards the end of the judgment which was delivered by Sir George Lowndes: the words are these—

"In the present case the document under consideration, in addition to creating an interest in the immovable property concerned, provides as one of the terms, and therefore as an integral part of the transfer, that the vendor should, if the vendee so requires, execute a registered sale deed, and it is contended for

(1) (1926) L. R. 53 I. A. 214.

(2) (1920) I. L. R. 43 Mad. 660; L. R. 47 I. A. 188.

(3) (1929) L. R. 50 I. A. 363.

the first respondent that, notwithstanding the non-registration, he can sue upon this agreement, putting the document in evidence as proof of it. Their Lordships are clearly of opinion that this is within the prohibition of the section. They think that an agreement for the sale of immovable property is a transaction 'affecting' the property within the meaning of the section, inasmuch as, if carried out, it will bring about a change of ownership".

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Then reference is made to the exception in section 17 of the Registration Act and then is added—

“ In the face of this provision, to allow a document which does itself create such an interest to be used as the foundation of a suit for specific performance appears to their Lordships to be little more than an evasion of the Act ”.

The words which are particularly relied upon as I have said are “ They think that an agreement for the sale of immovable property is a transaction 'affecting' the property within the meaning of the section ”. In my judgment it cannot be supposed that their Lordships intended by that observation to include any contract or any agreement for sale of immoveable property, whether another document was to be executed or not. The statement of Sir George Lowndes has to be read in conjunction with the reference made a moment later to the exception under section 17, and in any event as their Lordships came to the conclusion that the contract was in fact a conveyance to transfer the ownership of the property to the purchaser, the case could not have come within clause (v) of sub-section (2) of section 17. In my opinion the case of *Skinner v. Skinner*⁽¹⁾ does not stand in the way of the plaintiff-appellant in this case.

There does appear to be some conflict, if I may say so with respect to their Lordships of the Judicial

(1) (1929) L. R. 56 I. A. 363.

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Committee of the Privy Council, between *Dayal Singh's*(¹) case and the case in *Vyavan Chetti v. Subramanian Chetti*(²). But the matter before us can be disposed of on the considerations which I have already expressed, that is to say, that the agreement before us is an agreement coming within the exception to section 17 of the Registration Act and the clause at the end of the agreement which I have construed as a covenant not to incumber the property in no way modifies that decision.

In my judgment, therefore, this document coming as it does within the exception to section 17 was admissible in evidence and the decision of the learned District Judge on this point was therefore wrong.

I would allow the appeal, set aside the judgment of the learned District Judge and restore the judgment of the trial Court.

The appellant is entitled to his costs throughout.

The cross-objection is dismissed.

DHAVLE, J.—I agree. If upon a true construction of the deed upon which specific performance is sought we find that it does not operate as a transfer of any interest in the property, there is nothing in the law to prevent its being used in evidence for obtaining specific performance. The deed purports to be an agreement for sale. It recites the receipt of some part of the consideration, but the *Explanation* added to section 17 of the Indian Registration Act shows that such recital does not affect the non-liability to registration of a mere agreement for sale within section 17, sub-section (2), clause (v), of the Registration Act. The view of the learned District Judge that the document also created a mortgage of immovable property for the sum paid as earnest money seems entirely untenable. The clause which

(1) (1926) I. R. 53 I. A. 214.

(2) (1920) I. L. R. 48 Mad. 660; I. R. 47 I. A. 188.

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makes the property "*makful wo mahbus wo mustag-rak*" (words importing hypothecation of almost every conceivable kind) not only does not show what was taken or intended to be put into the deed as the debt secured, but shows its true character by the concluding portion—

"so that should I execute any deed of any kind whatsoever, deed of sale, rehan, etc., the same shall be treated as null and void and inoperative."

The clause that immediately precedes this clause does not refer to the earnest money but it does refer to the recovery of the costs that the intending purchaser might be put to in the event of the agreement for sale not being carried out; and yet it is not the case of the respondent that the document was intended to be used as a mortgage deed in respect of this possible liability. Why then the mortgage should be taken to refer to the earnest money, the receipt of which is recited several sentences earlier, the learned Advocate for the respondent has not been able to explain. In my opinion the clause was neither intended to operate nor does it actually operate as a mortgage at all; the document is really no more than what it professes to be—a *moahdanama* or deed of agreement for sale—and the clause was merely intended to operate as a covenant against encumbering or selling the property to another.

As regards the observation in *Skinner v. Skinner*⁽¹⁾ that "an agreement for the sale of immovable property is a transaction 'affecting' the property within the meaning of the section inasmuch as if carried out will bring about a change of ownership", the deed in the case before their Lordships was found by them clearly to purport to transfer George Skinner's interest in the immovable properties, and the observation in question must be read consistently with their Lordships' later observation that "they have the satisfaction of knowing that the principle which has been enunciated above is in accordance

(1) (1929) L. R. 56 L. A. 863.

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with recent decisions in most of the High Courts", among which they mention *Ramling Parwatayya Samble v. Bhagwant Sambhuappa Kathale*⁽¹⁾. This was a case in which it was held that a document which was an agreement to convey and created no interest in the property agreed to be sold was not compulsorily registrable under section 17, sub-section (2), clause (v), of the Indian Registration Act.

The document in question, therefore, did not require registration at all.

Assuming, however, that on another construction of the clause which creates a mortgage or charge the document did require registration, there is the further contention of Mr. Khurshed Husnain that in the present suit the deed was not put in to enforce any charge or mortgage and that there was nothing to prevent the plaintiff from using the other part of the document which purports to be a mere agreement for sale. In support of this contention he has cited definite authority in the decision of *Vyram Chetti v. Subramanian Chetti*⁽²⁾.

The view of the learned District Judge that the document was inadmissible in evidence and that therefore no specific performance could be decreed must, therefore, be overruled.

Appeal allowed.

Cross-objection dismissed.

APPELLATE CIVIL.

Before Courtney Terrell, C.J. and Macpherson, J.

DHANNA MISTRY

v.

BENGAL-NAGPUR RAILWAY COMPANY, LTD.*

Limitation Act, 1908 (Act IX of 1908), sections 4 and 12—mode of computation.

* Privy Council Appeals nos. 23, 25 and 27 of 1933 and no. 1 of 1934.

(1) (1925) I. L. R. 50 Bom. 334.

(2) (1920) I. L. R. 43 Mad. 660; L. R. 47 I. A. 188.

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