

be appointed Mutawalli. This appointment will hold good during the minority of Abdul Hai and will be subject to the result of any suit which may be instituted for the regular determination of the question as to who is entitled to be mutawalli. In case no such suit be instituted, Habibunnissa will cease to be Mutawalli when Abdul Hai attains majority and will then make over the trust property to him. We make no order about costs.

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Order accordingly.

APPELLATE CIVIL.

Before James and Rowland, JJ.

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Registration Act, 1908 (Act XVI of 1908), sections 17, 28 and 29—mortgage bond—fraud on registration—effect—suit on personal covenant—document, whether can be treated as a registered instrument for purposes of limitation—Limitation Act, 1908 (Act IX of 1908), Article 116, applicability of.

If the registration of a mortgage bond has been obtained by a fraud on the law of registration, the document cannot be treated as a registered instrument for the purpose of applying the provisions of Article 116 of the Limitation Act, 1908, to a suit on the personal covenant.

Sailendra Nath Singha v. Keshab Chandra Chowdhury(1) and *Jageshwar Prasad Onkar Prasad v. Mulchand*(2), followed.

*Appeal from Appellate Decree no. 510 of 1937, from a decision of Babu Rabindra Nath Ghosh, Subordinate Judge of Gaya, dated the 31st May, 1937, reversing a decision of Babu Ramjivan Sinha, Munsif of Gaya, dated the 21st September, 1936.

(1) (1937) 41 Cal. W. N. 783.

(2) (1939) A. I. R. (Nag.) 57, F. B.

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Dronamraju Rama Rao v. Vissapragada Vedayya(1),
dissented from.

Biswanath Prasad v. Chandra Narayan Chowdhury(2),
distinguished.

Appeal by the plaintiffs.

The facts of the case material to this report are set out in the judgment of James, J.

Sarjoo Prasad, for the appellants.

B. K. Prasad Sinha, for the respondents.

JAMES, J.—This second appeal arises out of a suit based on a mortgage bond. The bond was registered at Tikari, but the sub-registrar at Tikari could not have accepted it for registration unless it had contained a description of land within the jurisdiction of the Tikari sub-registry office. Both Courts have found that this entry was fictitious, and that registration was obtained by fraud to which mortgagor and mortgagee were parties, so that the deed cannot be treated as a registered mortgage deed, and therefore the mortgage debt cannot be regarded as secured on the mortgaged property described in the bond. The Munsif considered that he could give effect to the personal covenant as contained in a registered document, and he gave a money decree for the amount of money due under the covenant. The Subordinate Judge on appeal held that the document could not be regarded as a registered document at all. If the document could be treated as a registered document under Article 116 of the Schedule to the Limitation Act, the mortgagee would have six years during which he might sue on the personal covenant; but if the document were regarded as an unregistered document he would have been obliged to institute a suit within three years, and the suit in the present case would have been barred by limitation.

(1) (1922) I. L. R. 46 Mad. 435.

(2) (1921) I. L. R. 48 Cal. 509, P. C.

The plaintiff has come up in second appeal from that decision. The only question for decision in this appeal is whether, if the registration of a mortgage bond has been obtained by a fraud on the law of registration, the document can be treated as a registered document for the purpose of applying the provisions of Article 116 of the Limitation Act to a suit on a personal covenant. The question precisely in this form came before the Madras High Court in *Dronamarju Rama Rao v. Vissapragada Vedayya*(¹) wherein it was held that in similar circumstances the registration was good so far as it was registration of the personal covenant to repay the mortgage money, and the mortgagee was entitled to take advantage of the provisions of Article 116 of the Schedule to the Limitation Act. In *Sailendra Nath v. Keshab Chandra*(²), a Bench of the Calcutta High Court considering the same question expressly differed from the view of the Judges of the Madras High Court; and in a case recently decided a Full Bench of the Nagpur High Court has adopted the view taken by the Calcutta High Court [*Jageshwar Prasad Onkar Prasad v. Mulchand*(³)]. Mr. Sarjoo Prasad for the plaintiff-appellant argues in favour of the view taken by the learned Judges of the Madras High Court. He suggests that it should be considered that there was no fraud in obtaining registration of the bond so far as the personal covenant was concerned, because if the bond had contained nothing but the personal covenant, the provision of section 29 of the Registration Act would have applied and the document could have been registered at any registry office. The argument appears to be that if the document registered had been something other than what it was, no fraud would have been committed, and we

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are asked to call the document something other than what it was for the benefit of one of parties who actually did commit the fraud. I think that it would be more correct to say that if a party desires registration of a document containing a personal covenant he is entitled to obtain registration of it wherever he pleases, provided that the document does not affect immovable property: but if he desires to obtain registration of a document containing a personal covenant which also affects immovable property he is bound by the provisions of section 28 of the Indian Registration Act, and he is bound by those provisions for the whole of the document from beginning to end, and those provisions apply to the whole of the document. Mr. Sarjoo Prasad also suggests that the decision of their Lordships of the Judicial Committee in *Biswanath Prasad v. Chandra Narayan Chowdhury*⁽¹⁾ implies that in that case, although there was a fraud in registration which rendered the mortgage bond invalid, their Lordships considered that it might be valid as a registered contract to repay, because they left it open to the plaintiff of that case to apply to the High Court for a personal judgment on the mortgage debt. But there is nothing in that decision which implies that their Lordships considered that the plaintiff should be entitled to any advantage arising from the registration of the document, or that Article 116 of the Schedule would apply to the case. Lord Finlay expressly said that if the High Court should think it right to enter upon the consideration of this claim, all defences arising out of the lapse of time must be open to the defendants, and there is nothing in the decision which suggests that Article 116 of the Schedule would be applicable to the case. Mr. Sarjoo Prasad also suggests that to deny to the mortgagee, seeking a decree on the personal covenant, the benefit of the provisions of Article 116 is to permit a

(1) (1921) I. L. R. 48 Cal. 509, P. C.

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mortgagor to benefit by his own fraud. This is of course to some extent true of a judgment refusing a mortgage decree; but the finding of the courts below is that the mortgagor and the mortgagee are in this matter in *pari delicto*: and in those circumstances the position of the defendant is the better; and if one or the other is to profit by the fraud it cannot be the plaintiff in a suit. I do not consider that any grounds have been made out which would warrant our declining to follow the decision of the Calcutta High Court and the decision of the Full Bench of the Nagpur High Court. The view of the law taken by the learned Subordinate Judge is correct; and I would dismiss this appeal with costs.

ROWLAND, J.—I entirely agree.

In my view the jurisdiction conferred on the Sub-Registrar by section 29 is limited to receiving and registering "Every document other than a document referred to in section 28" and once it is found that the document was a document referred to in section 28 then the result is that if a Registrar had been aware of the facts he would have refused registration. The same consequences must follow as if registration had in fact been refused, that is to say, the entire document is on the footing of an unregistered document. Not only does it not affect any immovable property—section 49, but it must be considered unregistered for the purposes of limitation—Article 116 of the Schedule to the Limitation Act.

Appeal dismissed.

S. A. K.