

APPELLATE CIVIL.

Before Sir Guy Ruddle, Kt., K.C., Chief Justice, and Mr. Justice Brown.

GUPTA

v.

ADMINISTRATOR-GENERAL OF BURMA*

1927

Feb. 28.

Mortgage—Personal covenant to pay not always implied—Equitable mortgage by deposit of title deeds—Personal covenants when excluded—Personal decree, when granted.

Held, that a personal covenant cannot be implied in an anomalous mortgage, where no personal obligation to repay is provided for.

Held, further, that whilst in an ordinary case of an equitable mortgage there would be a personal covenant to repay, where the transaction was contemporaneous with a registered mortgage which determines the terms of the contract between the parties, the personal liability is not always presumed but would follow the registered mortgage.

Held, also, that unless a personal covenant to repay appears in the mortgage transaction, a personal decree may not be granted.

Pell v. Gregory, 52 Cal. 860—*referred to*.

Halkar—for Appellants.

Dadachanji—for Respondent.

RUTLEDGE, C.J., AND BROWN, J.—This is an appeal from an order of this Court on the Original Side refusing to grant a personal decree to the appellant on a mortgage which her late husband had obtained from one Maricar, Rangoon. The mortgage is registered and dated the 24th March 1921. There is a covenant by the mortgagor to pay interest at Rs. 1-8 per cent. per mensem, but nowhere in the mortgage deed is there any covenant to repay the principal. On the same day, but subsequent to the execution of the mortgage deed, the mortgagor deposited certain title deeds not mentioned in the mortgage deed as further security, thus

* Civil Miscellaneous Appeal No. 176 of 1926.

creating an equitable mortgage in respect of the said sum.

It has been urged on behalf of the appellant that the learned trial Judge was wrong in considering that the mortgage deed created a mortgage by way of conditional sale, that the Court should have held that there was a clear implied covenant to pay, and, further, that if an express covenant to pay was necessary in order to obtain a personal decree, an equitable mortgage in respect of the same transaction is in fact a simple mortgage and in all simple mortgages there is an express covenant to pay. Further, he relies upon the preliminary decree which gave the mortgagee power after the property mortgaged had been sold to apply for such decree.

With regard to the latter point, we do not think that it helps the appellant in any way. There is nothing to prevent the mortgagee applying for a money decree, but, in the words of Mr. Justice Mukerji in the case of *Pell v. Gregory* (1): "When such application is made, the question whether such a decree should or should not be passed has to be decided. It is not as if the later decree has to be passed as a matter of course. It has to be found that the net proceeds of the sale held under the decree under Rule 5 are insufficient and that the balance is legally recoverable and this may give rise to such question as whether the mortgagor is under a personal liability or whether the mortgagee is not precluded by the terms of the mortgage from realising his dues otherwise than out of the property sold, or whether the right to enforce such liability has been extinguished by the statute of limitation at the time the suit was instituted."

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(1) (1925) 52 Cal. at p. 860.

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It seems clear to us on an examination of the mortgage deed that it is not a simple mortgage nor an English mortgage, because in both instances according to section 58 of the Transfer of Property Act, the mortgagor binds himself personally to pay the mortgage money. We are not prepared to say that it satisfies the definition of a mortgage by conditional sale and it is clearly not a usufructuary mortgage. That being the case, we can only style it an anomalous mortgage.

In the several cases cited on behalf of the appellant, the one that goes furthest to help him seems to be I.L.R. 30 Allahabad, p. 388, but in this case the mortgage is not set out in the report, but the judgment states that "the appellant executed a deed of simple mortgage in favour of the respondent. The money was payable on demand." If the money was payable on demand there seems clearly an admission of liability to pay it. This fact would clearly distinguish that decision from the facts of the present case. As the present Chief Justice of Bengal observes at page 843 of *Pell v. Gregory* (1): "In India a mortgage does not necessarily import a personal obligation to repay. *Primâ facie*, this obligation is present in simple mortgages and of course in English mortgages. *Primâ facie*, it is not present in mortgages of conditional sale and in usufructuary mortgages. In each case, the question is one of construction of the mortgage instrument and the personal liability to repay may become barred before the right of recourse to the mortgage property is barred."

On our construction of the mortgage deed before us, we are of opinion that a personal decree cannot be obtained in respect of the balance due. But it has been urged for the appellant that we must presume a personal covenant to repay in the equitable mortgage by deposit of title deeds. In an ordinary case of an

equitable mortgage, there is usually some contemporaneous acknowledgment such as a promissory note, which would clearly amount to a promise to repay, but in a transaction like the present, which was almost contemporaneous with the execution of the registered mortgage, we can only look to the terms of the registered mortgage to ascertain the contract between the parties. There is absolutely no evidence on the record to show that there was any separate agreement in respect of the deposit of title deeds.

In these circumstances we are unable to imply such a covenant to repay as would enable us to grant a personal decree. In these circumstances, we think, that the judgment appealed from is correct and the appeal must be dismissed with costs.

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APPELLATE CIVIL.

Before Mr. Justice Carr and Mr. Justice Mya Bu.

MAUNG PO GYI AND ONE

v.

MAUNG MIN DIN.*

1927
 April 25.

Mortgage deed not duly attested—Admission of the deed whether sufficient—Evidence Act (I of 1872), s. 70—Admission cannot validate mortgage deed insufficiently attested—Transfer of Property Act (IV of 1882), s. 59.

Held, that section 70 of the Indian Evidence Act applies only to a document which is duly attested and that a mortgage deed not duly attested is invalid, in spite of the admission of the deed by the mortgagor.

Aung Rhi v. Ma Aung Kwa Pru and one, 1 Ran. 557—*distinguished*.

Hira Bibi v. Hari Lall, 5 Pat. 58 P.C.—*followed*.

Ba Han—for Appellants.

Tun Aung—for Respondent.

CARR AND MYA BU, JJ.—On the 19th September, 1924, the respondent filed this suit on a mortgage

* Letters Patent Appeal No. 109 of 1926.