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BAGULEY, J.

it necessary to deal with the many cases and authorities cited in argument.

For these reasons I set aside the judgment and decree of the lower Appellate Court, and restore that of the trial Court dismissing the suit. The respondents will bear the appellant's costs throughout.

PRIVY COUNCIL.

J.C.*

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MA PWA MAY AND ANOTHER *v.* S.R.M.M.A. CHETTYAR FIRM.

(On Appeal from the High Court at Rangoon.)

Transfer of Property Act (IV of 1882), s. 53—Transfer to defeat creditors—Mortgage preferring one creditor over others—Registration of document not duly stamped—Error of procedure—Good faith—Validity of registration—Indian Stamp Act (II of 1899), ss. 35, 37—Indian Registration Act (XVI of 1908), s. 87.

A mortgage executed for adequate consideration, being partly the discharge of a genuine debt, no benefit being retained by the mortgagor, is not invalid under s. 53 of the Transfer of Property Act, 1882, as being made to defeat or delay creditors, even though the mortgagor, who is heavily indebted, thereby prefers the mortgagee over other creditors, one of whom has instituted a suit, and before registration of the mortgage has obtained an order before decree attaching the mortgagor's property.

Musahar Sahu v. *Hakim Lal*, (1915) I.L.R. 43 Cal. 521 ; L.R. 43 I.A. 104—*followed.*

Registration of an instrument not duly stamped, contrary to s. 35 of the Indian Stamp Act, 1899, is an error of procedure, not an act done without jurisdiction, consequently if it is done in good faith the registration is valid under s. 87 of the Indian Registration Act, 1908 ; and upon payment of the duty and penalty the instrument is admissible in evidence.

Mujibunnissa v. *Abdul Rahim*, (1900) I.L.R. 23 All. 233 ; L.R. 28 I.A. 15 *distinguished.*

Sah Mukhun Lall Panday v. *Sah Kundun Lall*, (1875) L.R. 2 I.A. 210—*applied.*

Sarada Nath Bhattacharya v. *Gobinda Chandra Das*, (1919) 23 C.W.N. 534—*approved.*

Where an instrument bears a stamp which is of sufficient amount but is surcharged as a court-fees stamp, the stamp is " of improper description " within

* PRESENT.—LORD ATKIN, SIR JOHN WALLIS, SIR GEORGE LOWNDES AND SIR BINOD MITTER.

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s. 37 of the Indian Stamp Act, 1899, and the remedial provisions of the rules made thereunder apply.

Reference under s. 57 of Act II of 1899, (1901) I.L.R. 23 All. 213—*disapproved.*

Judgment of the High Court reversed as to s. 53 of the Transfer of Property Act.

Appeal (No. 102 of 1928) from a decree of the High Court July 15, 1927) modifying a decree of the District Judge of Magwe.

The suit was instituted by the appellants to enforce a mortgage dated March 13, 1924.

The questions arising upon the appeal were (1) whether the mortgage was invalid under section 53 of the Transfer of Property Act, 1882; and (2) whether the registration of the mortgage was invalid because when registered it was not duly stamped as required by the Indian Stamp Act, 1899, section 35.

The facts and the relevant statutory provisions appear from the judgment of the Judicial Committee.

Both Courts in India held that the registration having been effected in good faith was valid under section 87 of the Indian Registration Act, 1908, although the instrument was not duly stamped at that time.*

The District Judge held that though the mortgage was a preference of the mortgagees over other creditors of the mortgagors it was not invalid under section 53 of the Transfer of Property Act; he decreed the suit. Upon appeal to the High Court the learned Judges (Heald and Mya Bu, JJ.) were of the contrary opinion; accordingly they varied the decree to a simple money decree.

1929, *June* 27, 28. *De Gruyther, K.C.*, and *Pennell* for the appellants. The mortgage was not invalid under section 53 of the Transfer of Property Act even if its intention and effect were to prefer the mortgagees over other creditors: *Musahar Sahu* v. *Hakim Lal*

* [Reported at (1927) 5 Ran. 666.—*Ed.*]

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(1). Both Courts in India held, following *Sarada Nath Bhattacharya* v. *Gobinda Chandra Das* (2), that the registration was valid under section 87 of the Registration Act.

Dunne, K.C., and *E. B. Raikes* for the respondents. Upon the facts the High Court was justified in holding that the mortgage was not merely a preference of one creditor, but a scheme for the purpose of defeating the other creditors and void under section 53. But in any case the mortgage was not validly registered, and consequently could not be received in evidence. Section 35 of the Stamp Act, 1899, imperatively forbids the registration of an instrument which is not duly stamped. The registering officer therefore had no jurisdiction to register it, and section 87 of the Registration Act cannot be invoked : *Mujibunnissa* v. *Abdul Rahim* (3), *Jambu Parshad* v. *Muhammad Aftab Ali Khan* (4), *Ma Shwe Mya* v. *Maung Ho Hnaung* (5). The decision in *Sarada Nath's* case (2) was erroneous. The stamp used was not merely a stamp "of improper description" within the meaning of section 38 of the Stamp Act : *Reference under section 57 of Act II of* 1899 (6). The Stamp Act has been amended twice since that decision without any alteration in its provisions.

De Gruyther, K.C., in reply. The amount of the stamp was sufficient, the only defect being that the revenue stamp used had been surcharged for use for the payment of court-fees. That being so the instrument was duly stamped within the meaning of section

(1) (1915) I.L.R. 43 Cal. 521 ; L.R. 43 I.A. 104.
(2) (1919) 23 Cal. W.N. 534.
(3) (1900) I.L.R. 23 All. 233 ; L.R. 28 I.A. 15.
(4) (1914) I.L.R. 37 All. 49 ; L.R. 42 I.A. 22.
(5) (1922) I.L.R. 50 Cal. 166 ; L.R. 49 I.A. 95.
(6) (1901) I.L.R. 23 All. 213

35 of the Stamp Act, since that Act recognizes only two descriptions of stamps, namely adhesive stamps and impressed stamps : *Annapurnabai* v. *Lakshman Bhikaji Vakharkar* (1). But in any case the requirement of section 35 of the Stamp Act is a matter of procedure, and section 87 of the Registration Act prevents an error made in good faith from vitiating the registration. The considerations in *Sah Muklun Lall Panday* v. *Sah Koondun Lall* (2) affirmed in *Muhammad Ewaz* v. *Birj Lal* (3) apply. The decisions of the Board relied on by the appellants all related to presentation by an authorized person, and different considerations apply to cases of that kind.

July 25. The judgment of their Lordships was delivered by—

LORD ATKIN.—This is an appeal from a decree of the High Court of Judicature at Rangoon. The plaintiffs are the mortgagees under a mortgage dated March 13th, 1924, by which Maung Po Saung and his wife Ma Twe mortgaged to the plaintiffs for Rs. 20,000 four oil wells in the Yenangyaung oil-field. The consideration for the mortgage is alleged to be a sum of Rs. 13,764, the balance of principal and interest on three promissory notes dated June 25th, 1921, November 25th, 1921, and May 30th, 1923, for the sums of Rs. 7,700, Rs. 1,700 and Rs. 2,600 respectively, and made by the mortgagors in favour of the first-named mortgagee and her husband. The second-named mortgagee is Ma Pwa May's son. His wife is the niece of Maung Po Saung, one of the mortgagors. The further consideration, making up the total sum of Rs. 20,000, is alleged to be a present advance of

(1) (1894) I.L.R. 19 Bom. 145. (2) (1875) L.R. 2 I.A. 210, 216.
(3) (1877) I.L.R. 1 All. 465 ; L.R. 4 I.A. 166, 176.

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Rs. 6,236 in cash. The mortgage was registered on March 14th, 1924. There is no doubt that at the date of this mortgage the mortgagors were heavily indebted. One of their creditors was the respondent firm, who on March 20th, 1924, instituted a suit against them to recover Rs. 13,295, principal and interest, due on two promissory notes dated March 27th, 1923. On May 13th, 1924, the respondents obtained an order before decree for the attachment of the mortgagors' property, including the four wells, the subject of the mortgage in question. On June 10th the appellants, the mortgagees, having demanded payment without success, brought the present suit against the mortgagors to enforce the mortgage. The respondent firm applied to be added as a party to the suit as a necessary party under O. XXXIV, rule 1, and on September 6th, 1924, the District Judge made the order. A question was raised in the Courts below, but not before their Lordships, as to whether this order was correct. Their Lordships must not be taken as expressing an opinion upon this matter. The respondents thus added as defendants put in a written statement by which they alleged that the mortgage deed was executed without consideration and for the purpose of defrauding the respondents. They also pleaded that the document was improperly stamped, and that in consequence the registration was invalid and the document was also inadmissible in evidence. The issues fixed by the District Judge on the first plea were :—

1. Was the mortgage deed executed by the mortgagors and for valuable consideration ?
2. Was the mortgage deed executed in collusion with the plaintiffs for the purpose of defrauding the third defendant ?

The claim that the deed was void was based on section 53 of the Transfer of Property Act, 1882,

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which provides that any transfer of immovable property made with intent to defeat and delay the creditors of the transferor is voidable at the option of any person so defeated or delayed. The learned District Judge, after hearing evidence, found that the deed was duly executed by the mortgagors, and the consideration was truly stated in the deed, *i.e.*, that the promissory notes referred to were genuine notes on which the mortgagors were indebted to the mortgagees in the sums mentioned, and that the cash advance was in fact made. There appears to be no finding to the contrary by the High Court, who nevertheless came to the conclusion that the mortgage was made with intent to defeat and delay the creditors. This finding appears to their Lordships to be inconsistent with what must be taken to be the fact that the mortgagees were actual creditors of the mortgagors. A debtor is entitled to prefer a creditor, unless the transaction can be challenged in bankruptcy, and such a preference cannot in itself be impeached as falling within section 53 :—

"The transfer which defeats or delays creditors is not an instrument which prefers one creditor to another, but an instrument which removes property from the creditors to the benefit of the debtor. The debtor must not retain a benefit for himself. He may pay one creditor and leave another unpaid (*Middleton* v. *Pollock* (1). So soon as it is found that the transfer here impeached was made for adequate consideration in satisfaction of genuine debts, and without reservation of any benefit to the debtor, it follows that no ground for impeaching it lies in the fact that the plaintiff, who also was a creditor, was a loser by payment being made to the preferred creditor, there being in the case no question of bankruptcy . . . . . The concurrent finding that the consideration for the deed was real reduces the case to one in which the debtor has preferred one creditor to the detriment of another ; but this in itself is no ground for impeaching it under the section, even if the

(1) [1876] 2 Ch. D. 104, 108.

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debtor was intending to defeat an anticipated execution by the plaintiff."

Their Lordships find it unnecessary to add anything to the above authoritative exposition of the law of Lord Wrenbury in giving the decision of the Board in *Musahar Sahu* v. *Hakim Lal* (1). The plea of the respondents, therefore, on the merits failed.

It is necessary, however, to determine the issues raised by the objection to the stamp and the consequent objection to the registration. The point is highly technical and is as follows:—The mortgage was executed on a sheet which bore, not an ordinary revenue stamp, but a Court fee stamp. The stamp appears to be the ordinary impressed revenue stamp, but surcharged with the words "Court Fee" stamped over it. The amount of the stamp in this case is sufficient to satisfy the revenue requirements, but the respondents contend that the document is not "duly stamped" within the meaning of the Stamp Act, 1899. By section 35 of that Act, "No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having authority to receive evidence or shall be acted upon, registered or authenticated by any such person or by any public officer unless such instrument is duly stamped." Hence, say the respondents, the document (*a*) could not be admitted in evidence; (*b*) could not have been validly registered, therefore was unregistered; therefore under section 49 of the Registration Act of 1908 could not affect the immovable property comprised therein. This contention has been rejected by both Courts below, and their Lordships agree with their decision. What happened in the suit was that, before the respondents filed their

(1) (1915) 43 I. A. at p. 107.

written statement calling attention to the stamp objection, the plaintiffs applied to the Court for return of the mortgage deed in order that they might apply to the Collector for rectification of the error. The District Judge found himself bound by section 33 of the Stamp Act to impound the document, and eventually by direction of the High Court it was forwarded to the Collector under section 38 (2) of the Act, who, on payment of a further duty of Rs. 100 and a penalty of Rs. 5, certified it to be duly stamped. It was then received in evidence in the District Court. It follows that, in accordance with section 36 of the Act, its admission could not be called in question at any stage of the suit on a stamp objection. The question of admissibility is thus disposed of.

The attention of their Lordships was called to the provisions of section 37, which enables the Governor-General in Council to make rules providing that where an instrument bears stamps of sufficient amount, but of improper description, "it may on payment of the duty with which the same is chargeable be certified to be duly stamped, and any instrument so certified shall then be deemed to have been duly stamped as from the date of its execution." Their Lordships entertain no doubt that in pursuance of this section and the rules made thereunder (Rule 16 of the Rules of February 17th, 1899), the Collector would have been entitled in this case to exercise the powers given by the section. The contention to the contrary is that the section has no reference to any stamp except a revenue stamp pure and simple, and that a revenue stamp surcharged "Court Fee" is not within the meaning of the section a stamp of improper description. This appears to their Lordships to be putting too narrow

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a construction upon a remedial section, and their Lordships would not be prepared to assent to the opinion of the High Court of Allahabad in *Reference under s. 57 of Act II of* 1899 (1), so far as it concerns Court Fees stamps in their present form. It is plain, however, that the Collector was not asked to exercise his powers under section 37, but under section 38 (2) and section 40 (*b*). These sections do not contain the provision in section 37 that the document when certified shall be deemed to have been duly stamped as from date of execution. It is necessary, therefore, to consider the objection to the registration on the ground that, when registered, the document was not duly stamped. The plaintiffs meet this objection by relying upon the terms of section 87 of the Registration Act, which provides that "Nothing done in good faith pursuant to this Act, or any Act hereby repealed, by any registering officer, shall be deemed invalid merely by reason of any defect in his appointment or procedure." In seeking to apply this section it is important to distinguish between defects in the procedure of the registrar and lack of jurisdiction. Where the registrar has no jurisdiction to register, as where a person not entitled to do so presents for registration, or where there is lack of territorial jurisdiction, or where the presentation is out of time, the section is inoperative. See *Mujibunnissa* v. *Abdul Rahim* (2). On the other hand, if the registrar having jurisdiction has made a mistake in the exercise of it, the section takes effect. Their Lordships have no doubt that the mistake is an error in procedure. The prohibition against registration is included in section 35, amongst similar prohibitions as to admitting in

(1) (1901) I.L.R. 23 All. 213.
(2) (1900) I.L.R. 23 All. 233; L. R. 28 I.A. 15.

evidence and authenticating, which can only be regarded as procedure. The duty of the registering officer is to scrutinise the stamp and pass an opinion on its adequacy, as he purports to do in this very document. It would be remarkable that, if he made a mistake of possibly a few annas on the amount of stamp required, and admitted a document to registration, it would be treated as having no effect years afterwards. Their Lordships are fortified in this view by former decisions of this Board. In *Sah Mukhun Lall Panday* v. *Sah Koondun Lall* (1), the registrar had registered a deed of sale in the absence of the vendors contrary to the provisions of section 36 of the Act. The Board held that, having once been presented for registration, it was still in time for regular registration, though the first registration may have been invalid. There appears to have been an admission by the parties that the first registration was not valid. But the Board indicated an opinion that the first registration was validated by the provisions of section 88 of the Act (now section 87). Sir Barnes Peacock, in delivering the opinion of the Board, said (2) :—

In considering the effect to be given to section 49, that section must be read in conjunction with section 88, and with the words of the heading of part 10. "Of the Effects of Registration and Non-Registration." Now, considering that the registration of all conveyances of immovable property of the value of Rs. 100 or upward is by the Act rendered compulsory, and that proper legal advice is not generally accessible to persons taking conveyances of land of small value, it is scarcely reasonable to suppose that it was the intention of the Legislature that every registration of a deed should be null and void by reason of a non-compliance with the provisions of sections 19, 21, or 36, or other similar provisions. It is rather to be inferred that the Legislature intended that such errors or defects should be

(1) (1875) L.R. 2 I.A. 210. (2) *Ibid* at p. 216.

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classed under the general words "defect in procedure" in section 88 of the Act, so that innocent and ignorant persons should not be deprived of their property through any error or inadvertance of a public officer, on whom they would naturally place reliance. If the registering officer refuses to register the mistake may be rectified upon appeal, under section 83, or upon petition under section 84, as the case may be; but if he registers where he ought not to register, innocent persons may be misled, and may not discover, until it is too late to rectify it, the error by which, if the registration is in consequence of it to be treated as a nullity, they may be deprived of their just rights.

The opinion there expressed was adopted by the Board in *Mohammed Ewaz* v. *Birj Lall* (1), where two of the persons executing the deed admitted execution by themselves, but denied execution by the third party. The principle has been applied to registration of an insufficiently stamped deed by the High Court of Calcutta in *Sarada Nath Bhattacharya* v. *Gobinda Chandra Das* (1) a decision of which their Lordships approve. On this part of the case both the Courts below decided in favour of the plaintiffs, relying upon the decision of the High Court of Calcutta above cited.

Their Lordships are therefore of opinion that the plaintiffs were entitled to succeed in the suit. The appeal should be allowed. The decree of the High Court should be set aside, and the decree of the District Judge restored. Their Lordships will humbly advise His Majesty accordingly. The respondents must pay the costs of the appellants here and in the High Court.

Solicitor for appellants : *J. E. Lambert.*

Solicitors for respondents : *Bramall & Bramall.*

(1) (1877) I.L.R. 1 All, 465, 475 ; L.R. 4 I.A. 166, 176.
(2) 1919) 23 C.W.N. 534.