APPELLATE CIVIL.

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

1928

Dec. 3.

V.E.A.R.M. FIRM

v.

A.K.R.M.M.K. FIRM.*

Equitable mortgage—Deposit of title-deeds with intention to create security, essential—Omission to deposit one of the title-deeds, effect of—Subsequent equitable mortgage by deposit of the suppressed title-deed—Conflict between equitable mortgagees—Negligence—Transfer of Property Act (IV of 1 82), s. 78.

Respondent-plaintiffs claimed an equitable mortgage on two plots of land held under a lease from the Rangoon Development Trust, and a building thereon. The title-deeds which they held consisted of the original lease of one of the plots only, and a sale-deed from the original lessee to a purchaser (who was the mortgagor) comprising both the plots and the building. They could not get the lease document of the other plot as the mortgagor represented to them that he could not find it. The leases had endorsements as regards the sale from the original lessee to the mortgagor. Some sixteen months later, the mortgagor deposited the missing lease document with the defendant-appellants as security for a loan. In the mortgage suit filed by the plaintiffs, defendant-appellants claimed a prior equitable mortgage on the lot of which they held the lease document, as well as on the portion of the building that stood on such lot.

Held, that to establish an equitable mortgage it is necessary to prove (i) that documents of title were deposited with a creditor, and (ii) that the intent was to create a security thereon.

Held, that the title-deeds deposited with the plaintiff-respondents comprised the whole property and the intention of the parties was to create and did therefore create an equitable mortgage on the whole property, notwithstanding the absence of the lease document relating to one of the plots. In view of the circumstances of the case and especially having regard to the endorsements as regards the sale-deed on both the original leases, plaintiffs were not negligent and the appellants could claim no priority over them under s. 78 of the Transfer of Property Act.

A.L.R.M. Firm v. *L.P.R. Firm*, 4 Ran. 238; *Roberts* v. *Croft*, 53 Eng. Rep. 343—*referred to.*

Ba Maw for the appellants.

K. C. Bose for the respondents.

RUTLEDGE, C.J., and BROWN, J.—The respondent A.K.R.M.M.K. Chettyar Firm sued one Ma Ohn Sein

* Civil First Appeal No. 182 of 1928 against the judgment of the Original Side in Civil Regular No. 170 of 1928.

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and three others on an equitable mortgage. The property claimed to be mortgaged consists of two plots of land and a building thereon. The two plots of land are known as Lots Nos. 232 and 232A. They were originally held under a lease from the Rangoon Development Trust by one Ma Pyu who by a registered deed sold the two plots of land and the building thereon to one U Po Gyi. The respondent-plaintiffs claimed that they took an equitable mortgage of this property from U Po Gyi on the 5th December 1924. U Po Gyi is now dead and the first three defendants in the case are his legal representatives. They first contested the suit but finally dropped out of it and the real contest was between the respondent-plaintiffs and the appellents, who were the 4th defendant.

The appellant V.E.A.R.M. Firm claimed that they have an equitable mortgage on the property known as Lot No. 232A and so much of the building as stands thereon. The learned trial Judge held that the respondents had established their mortgage as regards Lot No. 232 and as regards all the buildings on both the pieces of land. The learned Judge held, however, that the respondents had failed to establish their claim as regards Lot No. 232A and gave a decree in favour of the appellants as regards this site. Otherwise the decree grants the plaintiffs' prayer. The V.E.A.R.M. Firm have appealed against this decree and cross-objections have been filed on behalf of the original plaintiffs.

It is contended on behalf of the appellants that a transfer of land of necessity carries with it a transfer of any building on that land, and that the learned trial Judge having found against the respondents that their mortgage on Lot No. 232A failed should have rejected the respondents' claim and refused a mortgage decree on so much of the building as stands on Lot No. 232A,

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The mortgage in favour of the appellants was effected some sixteen months after the mortgage in favour of the respondents. The learned trial Judge held that the appellants having obtained the lease deed as regards Lot No. 232A, that piece of land was under mortgage to them and not to the respondents. He referred to the case of *Pranjivandas Jagjivandas Mehta* v. *Chan Mah Phee* (1), where it was settled that the scope of the security created by a deposit of title-deeds is the scope of the title covered by those deeds. It does not seem to us, however, that very much help can be derived here from the decision in that case in which the point at issue was not whether an equitable mortgage could be created although there was not a complete deposit of all the title-deeds. An equitable mortgage is created by deposit with a creditor of documents of title to immoveable property with intent to create a security thereon. All that is necessary to prove to establish such a mortgage is (i) that documents of title were deposited with a creditor, and (ii) that the intent was to create a security thereon.

In the case of *Roberts* v. *Croft* (2), the facts were in many ways very similar to the facts in this case. In that case Roberts had deposited with one Miss Willis documents of title relating to certain property. These documents included all the previous title-deeds to the property but did not include the deed whereby Roberts himself obtained title. Subsequently Roberts deposited the remaining deed with Messrs. Bult. In each case the deposit was made with intent to create an equitable mortgage. It was held that in order to establish an equitable mortgage it was not necessary to prove that the deeds deposited showed a good title in the depositor, and although she received no deed shewing any right to the property in her mortgagor,

(1) (1914) 8 L.B.R. 458. (2) 53 English Reports 343.

it was nevertheless held that Miss Willis' mortgage was a perfectly good one. It was further held that the subsequent mortgage to Messrs. Bult by deposit of the remaining deed was also a perfectly good mortgage, but that there had been negligence on the part of Messrs. Bult and that, therefore, Miss Willis' mortgage must be preferred to theirs. In the present case, the documents deposited with the respondent firm consist of a sale deed with regard to both the pieces of land and the house and the lease deed with regard to Lot No. 232. Title deeds have therefore been deposited with regard to the whole property, and, in our opinion, a valid equitable mortgage has been created on the whole property if it has been shown that that was the intention of the parties at the time of the deposit.

The question of intention has not been specifically considered by the learned trial Judge, but we are of opinion that the respondent-plaintiffs did establish their case in this connection. The clerk of the Chettyar firm has given evidence on the point and he is supported in his evidence by one Maung Kan Hla. His explanation with regard to the lease deed of the property Lot No. 232A is that at the time U Po Gyi said he could not find the document. We understand that the bulk of the building affected is on Lot No. 232, but that the building on Lot No. 232 extends into Lot No. 232A, and it seems to us extremely unlikely that the respondent firm would intend to accept a mortgage of part only of a house. We consider it sufficiently established that the intention was to mortgage both the lots and the building thereon. We therefore hold that a valid mortgage of the whole property was effected in favour of the respondents.

It only remains therefore to consider whether the respondents have by their negligence entitled the

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appellants to claim any priority over them. It does not seem to us that they have established their case in this particular. Under section 78 of the Transfer of Property Act, the respondents' mortgage would have to be postponed to the appellants' mortgage if the respondents had been guilty of gross negligence.

It was held in the case of *A.L.R.M. Chettyar Firm* v. *L.P.R. Chettyar Firm* (1), that there was no universal rule to the effect that parting with title-deeds by a mortgagee amounted to gross negligence. In this case, the lease deed which was the only document of title held by the appellants bears an endorsement that the property was sold to U Po Gyi by registered deed. The appellants must therefore be held to have been aware of the fact that they had not got all the title-deeds relating to the property and there is no explanation as to why they made no enquiries. The respondent firm presumably knew that there was this endorsement on the lease of Lot No. 232A as there was a similar endorsement on their lease, and the mere fact that they did not insist on obtaining one of the documents of title which, on the face of it, must clearly have shewn the existence of another important document does not in our opinion amount to such gross negligence as to justify the appellants' mortgage being preferred to theirs.

It has been suggested on behalf of the appellants that the respondents admitted that the appellants' mortgage was taken without notice of their previous mortgage. We cannot, however, find anything on the record to justify this contention. It is true that it is recorded in the deposition of Rathnam Pillay that the learned advocate for the respondents, who had been questioning the witness with a view to establish actual notice, did not pursue that line. And the

(1) (1926) 4 Ran. 238.

learned trial Judge in his judgment comments on this matter to the same effect.

It is admitted that the respondents do not allege actual notice by the appellants. What they do allege is that the appellants were put on their enquiry and could have received actual notice had they taken reasonable precautions.

One other matter has been raised in appeal and that is as regards costs. It is contended that the actual proof of the respondents' mortgage was necessary only because the other respondents in the case denied the mortgage, and that costs of this part of the case should not have been awarded against the appellants. It is clear, however, that the appellants also though not denying mortgage did not admit it, and that being so, it became necessary for the respondents to prove their mortgage as against the appellants. We do not think therefore that there is any force in this contention. We dismiss the appeal and allow the cross-objections. We alter the decree of the trial Judge and give a mortgage decree in favour of the respondents for the whole of both the plots of land and the building thereon. The appellant-defendants will pay all the costs of the respondent-plaintiffs in the trial Court, and in this Court the appellants will pay the respondents' costs both on the appeal and on the cross-objections.