APPELLATE CIVIL.

Before Mr. Justice Das and Mr. Justice Brown.

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Mar. 7.

R.M.P.M. CHETTYAR FIRM
v.
SIEMENS (INDIA) LTD. AND OTHERS.*

Accession to mortgaged property—Fixture of machinery—Mortgage of premises prior to fixture—Attachment by seller of machinery for price—Mortgagee's claim to machinery—Circumstances attending fixture—Transfer of Property Act (IV of 1882), s. 70.

The second and third respondents executed a simple mortgage of their land and all buildings thereon in favour of the appellants. Thereafter they purchased certain machinery from the first respondent company and had it firmly fixed in the mortgaged building, although it could be removed without injury to the building. The premises were used as a rice-mill, and the machinery was fixed with the intention of permanent use in the mill. The second and third respondents executed promissory notes in favour of the first company for the balance of the purchase price. The company sued them on the promissory notes, and in execution of its decree attached the machinery. The appellants now sued the mortgagors, and by consent obtained a mortgage decree which specifically included the machinery. The company sued the appellants and the mortgagors claiming a lien or priority over the machinery in respect of its decree.

Held, that regard must be had to the nature and mode of fixture of the article in dispute, the intention with which it was fixed, the position of the rival claimants in regard to it, and in the circumstances of this case that the machinery was an accession to the mortgaged property, within s. 70 of the Transfer of Property Act, which the mortgagee was entitled to claim as against the company.

Reynolds v. *Ashby & Son*, (1904) A.C. 466—*followed.*

A.S.A. Veerappa Chetty v. *Ma Tin*, 4 B.L.J. 52; *Raja Kishendatt* v. *Raja Mumtaz Ali Khan*, I.L.R. 5 Cal. 198—*referred to.*

Venkatram for the appellants.

Lambert for the first respondent.

BROWN, J.—In the suit out of which this appeal has arisen the first respondent sued the appellant and the other respondents for a declaration that certain machineries erected in a mill were liable to be

* Civil First Appeal No. 54 of 1932 from the judgment of the District Court of Bassein in Civil Regular No. 50 of 1931.

sold in execution of their decree free of the mortgage in favour of the appellant, or in the alternative that the plaintiffs had a charge on the said machineries for the unpaid purchase money due on the same.

On the 25th of April, 1927, a mortgage was executed by the second and third defendants in favour of the appellant. The mortgage was a simple mortgage and the properties mortgaged were described as "the premises being Holding Nos. 14, 15, 17, 18, 25, 26, 27 and 54 of 1926-27 measuring ·328, ·074, 7·753, ·548, ·483, ·016, 1·648 and ·091 acres respectively, all at Mata Quarter, Myoma Southern Circle, Bassein Town and which are mentioned in sale deed No. 1423, dated the 25th April, 1927, together with all the buildings thereon". On the 2nd June, 1927, the second and third respondents entered into a contract with the first respondent for the purchase of certain machinery. It is claimed that the agreement was one of hire-purchase. This claim is based on a clause in the agreement in which the buyers agreed that the machinery should remain the property of the sellers until the final payment had been made for it. After the purchase of this machinery, the machinery was installed in a building which was on the mortgaged land at the time of the mortgage. The purchasers paid a part only of the purchase price and for the balance due, on the 16th of October, 1928, they executed certain promissory notes. The first respondents brought a suit against them on these promissory notes in this Court and obtained a decree. In execution of that decree they attached the machinery in dispute. After the date of the attachment the appellant firm brought a suit on their mortgage and obtained a mortgage decree against the second, third and fourth respondents. The mortgage decree was a consent decree and specifically included the machinery

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now in suit. The question we have to decide is whether the claim of the appellant mortgagee or of the first respondents is entitled to priority as regards this machinery. The District Court has decided in favour of the first respondents.

It has been contended on behalf of the appellant that by accepting the promissory notes and by suing on them the first respondents must be held to have waived any claim they might have to a lien or charge on the machinery. It does not seem to us that this is a matter of very great importance because whether or not the first respondents retained any lien or charge they may have had immediately after the sale their attachment of the property was prior to the filing of the mortgage suit by the Chettyar and they are therefore entitled to have their claim settled out of the property in dispute unless at the time of the attachment the property was under mortgage to the appellant.

Under s. 70 of the Transfer of Property Act, if, after the date of a mortgage, any accession is made to the mortgaged property, the mortgagee, in the absence of a contract to the contrary, shall, for the purposes of the security, be entitled to such accession. The question for decision is therefore whether in the circumstances of this case the machinery should or should not be treated as an accession to the property mortgaged.

At the time of the mortgage there was no machinery in the building. It does not appear in the evidence but we were given to understand at the Bar that the building had previously been used as a saw-mill and that it was subsequent to the mortgage that it was converted into a rice-mill. It is shown by the evidence in the case that the machinery is fixed to the foundation of the mill by a number of bolts.

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The foundation appears to be a brick foundation. The machinery could all be removed from the building without damaging the foundation and would take about half a day to remove.

We have been referred on behalf of the appellant to the case of *Reynolds* v. *Ashby & Son* (1). In that case there had been a mortgage of certain premises together with the buildings, fixtures, machinery and fittings erected thereon. After the mortgage the mortgagor purchased certain machinery under a hire-purchase agreement. "The machinery was then put on the ground floor of the factory on beds of concrete prepared for them. Each machine was complete in itself. Each was fastened down to its concrete bed by bolts and nuts. The bolts were firmly fixed in the concrete and passed through and projected beyond holes in the machine. The nuts were screwed on the ends of the bolts where they projected, and the machines were thus held fast. By unscrewing the nuts each machine, although heavy, could no doubt be raised up and removed without injury to the building containing it, and without injury to its concrete bed and to the bolts embedded in it." So far therefore as the fixing of the machinery is concerned, the circumstances of that case are very similar to those of the present case. In the present case the machine was firmly fixed to the building but it could be removed without permanent injury to the building. It was held by their Lordships that the mortgagees were entitled to claim these machineries as part of their mortgage security, and it was held that this was the case notwithstanding the fact that the mortgagor had not acquired the ownership of the machine by paying for it. It is difficult to see

(1) (1904) A.C. 466.

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how that case can well be differentiated from the present case. In the course of his judgment Lord Lindley remarked at pages 473 and 474 :

"My Lords, I do not profess to be able to reconcile all the cases on fixtures, still less all that has been said about them. In dealing with them attention must be paid not only to the nature of the thing and to the mode of attachment, but to the circumstances under which it was attached, the purpose to be served, and last but not least to the position of the rival claimants to the things in dispute. In this case, and still regarding the question for the present as concerning the mortgagor on the one side and the mortgagee on the other, it is in my opinion impossible to hold that the machines did not pass with the mortgage."

A test applied in English Law for a decision on a question of fixtures is whether the machinery attached to real property is attached thereto for the permanent use or the more beneficial enjoyment thereof. At the time of the mortgage in the present case there was no machinery in the building but the building would appear to have been erected for the purposes of a mill. It has since the erection of this machinery been used as a rice-mill and when the machinery was put in I do not think there could have been any other intention than that it should be for permanent use in the building. It is true that the mortgage deed contains no specific mention of the machinery but as I have said, there was at the time of the mortgage no machinery in the building.

It has been urged that the law in India on the question of fixtures is not the same as the law in England. There is good authority for the view that all the technical rules founded on the Common Law in England on the subject of fixtures do not apply in India. It was however held by their Lordships of the Privy Council in the year 1879 before the enactment of the Transfer of Property Act that the

general equitable principle that most acquisitions by the mortgagor enure for the benefit of the mortgagee, increasing thereby the value of the security, could be applied to cases in India. [*Raja Kishendatt Ram* v. *Raja Mumtaz Ali Khan* (1).] This principle would appear to have been embodied subsequently in s. 70 of the Transfer of Property Act. In *A. S. A. Veerappa Chetty* v. *Ma Tin and others* (2) it was held that the principle of accession did not apply to certain electric machinery installed in a building. The case of *Reynolds* v. *Ashby & Son* is not referred to by the learned Judges who decided that case and there was no evidence in that case as to the manner in which the machinery was attached to the building.

It was pointed out that in such cases the important test was the intention with which the articles were put into the house and it was held that in the circumstances of the case it could not be found that the machinery was provided for permanent use in the house or for its more beneficial enjoyment. I think it is clear from the circumstances of the present case that there was no idea of mere temporary use of this machinery and that it was installed in the building for permanent use. It may be that the technical rules of English Law on the question of fixtures do not apply in their entirety in this country, but s. 70 was presumably enacted with the idea of introducing into the law of India the general principle as regards accessions to mortgage securities in force in England. I can find no material particulars on which the circumstances of this case can be differentiated from the circumstances in the case of *Reynolds* v. *Ashby & Son*, nor can I find any special

(1) (1879) I.L.R. 5 Cal. 198, at p. 210. (2) (1925) 4 B.L.J. 52.

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reason why the interpretation there put on the law as to what is an accession accruing for the benefit of the mortgagee should not be applied in this country.

For these reasons I would hold that the Chettyar appellant was entitled to claim the machinery in question as an accession to his mortgage security under the provisions of s. 70 of the Transfer of Property Act. That being so, the plaintiff-respondents must fail in the claim made by them. I would therefore set aside the decree of the trial Court and pass a decree dismissing the suit of the plaintiff-respondents ; the plaintiff-respondents to pay the costs of the appellant in both Courts, advocate's fee in this Court five gold mohurs.

DAS, J.—I agree.

APPELLATE CIVIL.

Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Mya Bu.

1933

Mar. 16.

TAN SOON THYE AND OTHERS

v.

L. E. DUBERN.*

"On demand"—Demand when necessary—Liability of debtor, when it arises—Intention of parties—Limitation Act (IX of 1908), *Sch.* I, *Art.* 132.

Primâ facie where a person agrees to pay a certain sum "on demand" that sum is payable forthwith, but in each case the question whether or not the parties intended that the words "on demand" should be treated as an integral and operative part of the agreement depends upon the true construction of the agreement into which the parties have entered. The question to be conisdered is whether the words "on demand" are mere words, or whether looking at the whole document it was really intended that the demand should be made before the liability to pay arose.

Hanmantram v. *Bowles*, I.L.R. 8 Bom. 561 ; *N. Joachimson* v. *Swiss Bank Corporation*, (1921) 13 K.B. 110 ; *Nettakaruppa* v. *Kumarasami*, I.L.R. 22 Mad. 20 ; *Norton* v. *Ellam*, 2 Mee. & Wel. 461 ; *Secretary of State for*

* Civil First Appeal No. 89 of 1932 from the judgment of this Court on the Original Side in Civil Regular No. 16 of 1932.