APPELLATE CIVIL.

Before Mr. Justice Baguley and Mr Justice Sen.

1935

Nov. 20.

THE BANK OF CHETTINAD, LIMITED,

v.

MA BA LO AND OTHERS.*

Mortgage by deposit of title-deeds with one creditor—Subsequent loan by another creditor on registered first mortgage—Loan by third creditor to pay off first creditor—Deposit of title-deeds with third creditor—Third creditor's claim of taking over assets of first creditor—No assignment by registered instrument—No endorsement to third creditor of debtor's promissory note in favour of first creditor—Third creditor's claim to priority over the second creditor—Equitable subrogation—Doctrine inapplicable in India—Mortgage by registered deed—Obligation to call for title-deeds—Transfer of Property Act (IV of 1882), ss. 74, 78, 101 and s. 92 (amending Act XX of 1929).

In 1927 the Chettyar firm of S advanced a sum of money to the respondents 1 and 2, and to one Y who died during the pendency of the suit, his legal representatives being respondents 3 to 10. The borrowers gave a promissory note and deposited with S the title-deeds of three pieces of paddy land as security. In 1929 the appellant bank advanced the borrowers a sum to enable them to pay off S, and the bank took from them a promissory note and a deposit of title-deeds of several paddy lands including those mortgaged to S. The bank gave a cheque to the borrowers which they indorsed to S. Earlier, in 1928, the borrowers had obtained a loan from three chettyar firms, respondents 11, 12 and 13, secured by a registered first mortgage of property which included the lands mortgaged to S. They were not aware of the deposit of title-deeds with S. In 1932 the bank filed a suit against the respondents, and claimed priority over respondents 11 and 13 in respect of the three pieces of paddy land. The bank pleaded that the S firm was wound up, and it had taken over the major part of the business and outstandings of the S firm including the mortgage in suit, and with the consent of the mortgagors the account and title-deeds thereupon came into the possession of the bank, and that the bank was the successor in interest of S. The bank also pleaded that it had no notice of the mortgage of respondents 11 to 13, and that since 1927 S, and then the bank, had possession of the title-deeds of the mortgaged property. There was no endorsement to the bank of the promissory note of the borrowers in favour of S, nor any transfer of the security by a registered instrument. The bank relied on equitable subrogation.

Held, that (1) a mortgage is a transfer of an interest in immovable property, and such an interest can only be transferred by registered deed.

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* Civil First Appeal No. 158 of 1934 from the judgment of the District Court of Insein in Civil Regular Suit No. 35 of 1932.

Bank of Upper India, Ltd. v. *Skinner*, I.L.R. 51 All. 494; *The Official Receiver, Trichinopoly* v. *Aiyar*, 41 Mad. L.J. 453; *Perumal Ammal* v. *Naicker*, I.L.R. 44 Mad. 196; *S.P.K. Chettyar Firm* v. *M.K.R. Raman Chettyar*, Civil First App. No. 119 of 1933, H.C. Ran.—*referred to.*

It makes no difference that the mortgage in question was one by deposit of title-deeds.

Elumalai Chetty v. *Mudaliar*, I.L.R. 44 Mad. 965; *Imperial Bank of India* v. *Rai Gyaw Thu & Co., Ltd.*, I.L.R. 1 Ran. 637—*referred to.*

(2) S. 92 of the Transfer of Property Act (XX of 1929) was not retrospective in its effect.

Jagdeo Sahu v. *Mahabir*, I.L.R. 13 Pat. 111; *Kanjee* v. *Pillai*, I.L.R. 56 Mad. 169; *Ko Po Kun* v. *C.A.M.A.L. Firm*, I.L.R. 10 Ran. 465—*referred to.*

There was no legal subrogation in favour of the appellant bank under either s. 74 or s. 101 of the Transfer of Property Act (IV of 1882).

(3) The basis of the doctrine of equitable subrogation is a fictional agreement by the quasi-lender with the debtor or creditor that he should receive and hold an assignment of the debt and security.

Baroness Wenlock v. *The River Dee Company*, 19 Q.B.D. 155; *Sinclair* v. *Brougham*, 1914 A.C. 398; *In re Wrexham, etc., Co.*, 1 Ch.D. 440—*referred to.*

The equitable doctrine of subrogation could not be applied in India in violation of the express provisions of the statute which require a registered instrument in respect of the claim put forward by the bank, and in the absence of such registered instrument, the bank's claim to priority failed.

Ariff v. *Jadunath Majumdar*, 58 I.A. 91; *Currimbhoy & Co., Ltd.* v. *Creet*, 60 I.A. 297; *Ma Kyi* v. *Ma Thon*, I.L.R. 13 Ran. 274; *Pir Bakhsh* v. *Mahomed Tahar*, 61 I.A. 388—*followed.*

(4) There is no obligation on a mortgagee who takes a registered instrument in respect of his mortgage to call for and retain in his possession the title-deeds of the mortgaged property. In any event on the date of the loan by the respondents 11 to 13, the title-deeds of the property were with S and the bank had no claim on them at the time,

Lloyds Bank, Ltd. v. *Guzdar & Co.*, I.L.R. 56 Cal. 868—*referred to.*

N. M. Cowasjee for the appellant.

Hay for the 11th, 12th, 13th respondents.

SEN, J.—This appeal raises a question of general importance. The facts of the case are simple. On the 15th of November, 1927, the 1st and 2nd respondents, together with one Maung Su Ya, who is represented by the 3rd to the 10th respondents, borrowed Rs. 10,000 from the S.R.M.M.A. Chettyar Firm, Rangoon, upon a promissory note secured by a

1935

THE BANK OF CHETTINAD, LIMITED v. MA BA LO.

SEN, J.

mortgage by deposit of title-deeds of three pieces of paddy land, aggregating 197·23 acres. In 1929 the appellant bank was formed as a private limited liability company. On the 19th of November, 1929, the appellant bank lent a sum of Rs. 10,000 to the 1st and 2nd respondents and Maung Su Ya, and these three executed a promissory note in favour of the bank. This loan was secured by a mortgage by deposit of title-deeds of 663·87 acres of paddy land, which included the lands that had been mortgaged to the S.R.M.M.A. Firm. This loan of Rs. 10,000 was made by the appellant bank to enable the borrowers to pay off the principal due to the S.R.M.M.A. Firm upon their promissory note of the 15th of November, 1927, as that firm appears to have commenced to wind up its business upon the formation of the appellant bank. The payment was made by a cheque on the Imperial Bank of India (exhibit A), for Rs. 10,000 drawn by Thenappa Chettyar as the manager of the appellant bank in favour of the 1st and 2nd respondents and Maung Su Ya or bearer. These persons endorsed the cheque in blank and handed it to Thenappa Chettyar as the agent of the S.R.M.M.A. Firm. Thenappa Chettyar sent the cheque to the Imperial Bank and the Imperial Bank credited the amount of the cheque to the account of S.R.M.M.A. and debited the appellant bank with it. A small sum appears to have remained due on account of interest and was paid by the debtors out of their own money to the S.R.M.M.A. Firm. On the 12th November, 1932, the appellant bank filed the suit out of which this appeal arises. The defendants were the 1st and 2nd respondents and Maung Su Ya and three Chettyar Firms, the 11th, 12th and 13th respondents, to whom the 1st and 2nd respondents, Maung Su Ya and others, had by a duly registered deed dated the

16th of July, 1928 (exhibit 1), mortgaged considerable properties, including the properties mortgaged to the S.R.M.M.A. Firm. Maung Su Ya died during the pendency of the suit and his legal representatives were brought on the record as defendants 3 to 10. Respondents 11 to 13, who were originally defendants 4, 5 and 6, thereupon became defendants 11, 12 and 13.

The plaint states as follows :

1. That the plaintiffs are the mortgagees of the properties belonging to defendants 1 to 10.

2. That the following are the particulars of the mortgage :

(*a*) Date of mortgage—15th November, 1927.

(*b*) Mortgagors—1. Ma Ba Lo.

2. Maung Tha Hpan.

3. Maung Su Ya, deceased, but now represented by defendants 3 to 10.

(*c*) Mortgagees—S.R.M.M.A. Chettyar Firm of Mogul Street, Rangoon.

(*d*) Sum secured—Rs. 10,000.

(*e*) Rate of interest—Rs. 1-4-0 per cent per mensem.

(*f*) Property subject to mortgage—As in schedule below.

(*g*) Amount now due—Rs. 12,750.

3. That the Bank of Chettinad, Limited, was incorporated as a private limited liability company in 1929 and took over *inter alia* the major part of the business and outstandings of the S.R.M.M.A. Firm, Rangoon, including the mortgage in suit, and with the consent of the mortgagors the account and the title-deeds thereupon came into the possession of the plaintiffs' bank who are the successors in interest of the S.R.M.M.A. Firm, the necessary adjustments having been made in the accounts of S.R.M.M.A. Firm and the plaintiff bank.

4. That the mortgagors renewed the promissory note for Rs. 10,000 on the 19th November, 1929, in favour of the plaintiff bank on the security of the title-deeds.

5. That in May, 1932, the plaintiffs discovered that the defendants 11 to 13 had obtained a registered mortgage on the 16th day of July, 1928, and later on became purchasers of the mortgaged property. Until May, 1932, the plaintiffs had no knowledge of the aforesaid mortgage and sale.

1935

THE BANK OF CHETTINAD, LIMITED v. MA BA LO.

SEN, J.

6. That if it be held that the renewal referred to in paragraph 4 constituted a fresh mortgage, the plaintiffs submit that they are entitled to priority over the defendants 11 to 13 inasmuch as the title-deeds of the mortgaged property have been in possession of the S.R.M.M.A. Firm and the plaintiffs' bank since 1927.

The schedule to the original plaint contained 11 items of paddy lands measuring altogether 663·87 acres. On the 17th of January, 1933, the schedule was amended by withdrawing from it all but the three pieces of paddy land that had been mortgaged to the S.R.M.M.A. Chettyar Firm. There can be no doubt, however, on the evidence that the appellant bank obtained as security for its loan 663·87 acres of paddy land and are in possession of the title-deeds relating thereto.

The 1st and 2nd respondents filed their respective written statements but took no part in the trial of the suit. By their written statements dated the 25th of February, 1933, the 11th, 12th and 13th respondents state as follows :

1. Save that they admit that the plaintiffs are a private limited liability company, these defendants have no knowledge of and do not admit paragraphs 1, 2, 3, 4, 7 and 8 of the plaint and put plaintiffs to strict proof thereof.

2. In regard to paragraph 5 of the plaint these defendants admit that by a duly registered deed dated the 16th of July, 1928, various properties, including the suit properties, were mortgaged to these defendants and that the said properties were subsequently conveyed to them by duly registered deed dated the 30th of June, 1931. The vendors were the (1) 1st defendant ; (2) the 2nd defendant ; (3) the 3rd defendant ; (4) Tan Yon Gyi ; (5) Tan Swee Hline and (6) Ma Sein Che. The mortgage deed was executed by the first five named vendors and the 6th accepted it and gave her consent thereto. These defendants do not admit the other allegations contained in the said paragraph and submit that in any event plaintiffs had legal notice of the mortgage in favour of these defendants.

3. These defendants deny that the plaintiffs are entitled in law or in fact to any priority over their mortgage. They do not admit the allegations of fact contained in paragraph 6 of the plaint and set up their mortgage of the 16th of July, 1928, as a shield against plaintiffs' alleged mortgage.

It is not the case of the appellant bank that the promissory note in favour of the S.R.M.M.A. Firm had been endorsed to it or that there was any transfer of the security to it in writing registered. The defects in the plaint are apparently due to the fact that Thenappa Chettyar was no longer in the service of the bank at the time the suit was filed. He is also not a witness in the case.

The trial Judge held, *inter alia*, that the appellant bank did not take over the mortgage debt and title-deeds as alleged in paragraph 3 of the plaint; that, as the mortgage in favour of the 11th, 12th and 13th respondents was by registered deed, the appellant bank must be deemed in law to have had notice of it; that the appellant bank was not entitled to priority; and that it was not subrogated to the rights of the S.R.M.M.A. Firm. He held in effect that the old section 74 of the Transfer of Property Act did not confer any right on a stranger; and that under the new section 92 the bank could only claim subrogation if the mortgagors had by a registered instrument agreed that the bank should be so subrogated.

The learned District Judge passed a preliminary mortgage decree against the 1st and 2nd defendants personally and against the 3rd to the 10th defendants as legal representatives of Maung Su Ya, deceased, and ordered that the prior mortgage of the 11th to 13th defendants must be redeemed before the properties could be brought to sale. The plaintiff bank has preferred this appeal upon the ground that an

1935

THE BANK OF CHETTINAD, LIMITED v. MA BA LO.

SEN, J.

amendment of the plaint was wrongly refused; that the transfer of the 19th of November, 1929, amounted in law to taking over the mortgage debt and security; that alternatively the bank was entitled to subrogation and priority; and that the learned Judge erred in law in holding that the bank had notice of the registered mortgage, and also erred in holding that section 92 of the Transfer of Property Act was retrospective.

The point as regards the refusal of the trial Court to allow further amendment of the plaint was not urged at the hearing before us, and in our view, from the facts appearing on the record, the lower Court was justified in refusing the amendment asked for.

It was contended by the learned counsel for the appellant bank that as it had taken over the business and outstandings of the S.R.M.M.A. Firm it was entitled in some way or other to recover upon the mortgage of 1927 and upon the footing that it was still alive and unsatisfied. There is no evidence of the manner in which such taking over was effected and, as regards the transactions of 1927 and 1929, the evidence points to their having been treated as distinct. It is, however, admitted that the security in question had not been transferred by the S.R.M. M.A. Firm to the appellant bank by any registered instrument, and it seems to us that the absence of a registered transfer is fatal to the appellant's contention.

A mortgage is a transfer of an interest in immoveable property, and the interest of a mortgagee is immovable property. Consequently such an interest can only be transferred by registered deed. For this view there is ample authority to be found in the following cases: *Perumal Ammal* v. *Perumal Naicker*

and another (1); *The Official Receiver, Trichinopoly* v. *Lakshman Aiyar* (2); *Bank of Upper India, Limited (In Liquidation)* v. *Fanny Skinner and others* (3); and in an unreported case of this High Court—*S.P.K. Chettyar Firm and one* v. *M.K.R. Raman Chettyar* (4). In our opinion it makes no difference that the mortgage in question is one by deposit of title-deeds. See *The Imperial Bank of India* v. *U Rai Gyaw Thu & Co., Ltd.* (5). At page 644 Lord Dunedin delivering the judgment of their Lordships of the Privy Council states :

"It is to be observed that there is here no distinction between legal and equitable mortgages as in English Law, where the legal mortgage will always prevail against the equitable unless the holder of the legal has done or omitted to do something which prevents him in equity from asserting his paramount rights."

Again at page 648 there appears the following passage :

"Unless the deposit of title-deeds effects the transfer of an interest in a specific immoveable property for the purpose of securing the payment of money advanced or to be advanced, it is absolutely nothing at all."

See also *Elumalai Chetty and another* v. *P. Balakrishna Mudaliar* (6).

It was next contended on behalf of the appellant that the new section 92 of the Transfer of Property Act is not retrospective. In our opinion this contention is well founded. It is a cardinal rule of legal interpretation that

"statutes are not to be interpreted so as to have a retrospective operation, unless they contain clear and express words

(1) (1920) I.L.R. 44 Mad. 196.
(2) 41 Mad. L.J. 453.
(3) (1928) I.L.R. 51 All. 494.
(4) Civ. 1st App. 119 of 1933, H.C. Ran. *infra* p. 508.
(5) (1923) I.L.R. 1 Ran. 637.
(6) (1921) I.L.R. 44 Mad. 965.

1935

THE BANK OF CHETTINAD, LIMITED v. MA BA LO.

SEN, J.

to that effect, or the object, subject-matter or context shows that such was their object."

In *Ko Po Kun* v. *C.A.M.A.L. Firm* (1), it was held that section 101 of the Transfer of Property Act, as amended by Act XX of 1929 has no retrospective effect, and there is no reason why the principles discussed and applied in that case should not equally be applied to section 92 of the Act. See also *Jagdeo Sahu* v. *Mahabir Prasad* (2) and *Kanjee and Mooljee Brothers* v. *T. Shanmugam Pillai* (3).

The learned counsel for the mortgagee-respondents did not seek to support the view of the learned District Judge that section 92 was retrospective. He maintained that the equitable doctrine of subrogation for which the appellant was contending could have no force in India and was opposed to the provisions of the Transfer of Property Act. It is clear in this case that there is no question of any legal subrogation. Legal subrogation takes place of right and by operation of law. The old section 74 of the Transfer of Property Act ran as follows :

"Any second or other subsequent mortgagee may, at any time after the amount due on the next prior mortgage has become payable, tender such amount to the next prior mortgagee, and such mortgagee is bound to accept such tender and to give a receipt for such amount; and (subject to the provisions of the law for the time being in force regulating the registration of documents) the subsequent mortgagee shall, on obtaining such receipt, acquire, in respect of the property, all the rights and powers of the mortgagee, as such, to whom he has made such tender."

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(1) (1932) I.L.R. 10 Ran. 465. (2) (1933) I.L.R. 13 Pat. 111.
(3) (1932) I.L.R. 56 Mad. 169.

Section 101 before its amendment was in the following terms :

"Where the owner of a charge or other incumbrance on immoveable property is or becomes absolutely entitled to that property, the charge or incumbrance shall be extinguished, unless he declares, by express words or necessary implication, that it shall continue to subsist, or such continuance would be for his benefit."

It is obvious that the appellant bank cannot bring itself within the provisions of any of these sections.

Turning now to the equitable doctrine of subrogation : Upon what principles is it founded ? In *Baroness Wenlock and others* v. *The River Dee Company* (1), Fry, L.J., at page 165 speaks of it as follows :

"This equity is based on a fiction, which, like all legal fictions, has been invented with a view to the furtherance of justice. The Court closes its eyes to the true facts of the case, *viz.*, an advance as a loan by the quasi-lender to the company, and a payment by the company to its creditors as out of its own moneys : and assumes on the contrary that the quasi-lender and the creditor of the company met together and that the former advanced to the latter the amount of his claim against the company and took an assignment of that claim for his own benefit. There is no reason that we can find for supposing that this imaginary transaction between the quasi-lender and the creditor was confined to the day and hour of the advance of the money to the company ; in the coffers of the company the money really advanced as a loan is still thought of by the Court as the money of the quasi-lender : and the Court, as the author of the benevolent fiction on which it acts, can fix its own time and place for the enactment of the supposed bargain between the two parties who have met and contracted together only in the imagination of the Court."

(1) (1887) 19 Q.B.D. 155.

1935

THE BANK OF CHETTINAD, LIMITED v. MA BA LO.

SEN, J.

In *In re Wrexham, Mold and Connah's Quay Railway Company* (1), Vaughan Williams, L.J., at page 463 observes :

"I very much doubt whether, either at law or in equity, a man who pays off a debt at the request of another is necessarily to be treated as the assignee of that debt; but a very little evidence will be sufficient to establish that, as between himself and the person at whose request he has paid off the debt, it was intended that he should be treated as the transferee of the securities, if such there be, in the hands of the creditor."

It is to be observed that the basis of the doctrine of equitable subrogation is a fictional agreement by the quasi-lender with the debtor or creditor that he should receive and hold an assignment of the debt and security.

In *Sinclair* v. *Brougham and another* (2), Viscount Haldane, L.C., at page 417 observes :

"For to impute a fictitious promise is simply to presume the existence of a state of facts, and the presumption can give rise to no higher right than would result if the facts were actual."

Lord Dunedin at page 433 observes :

". . . how is it possible to say that there is a fictional contract which is binding in circumstances in which a real contract is not binding?"

Now, as an interest in immovable property of the value of Rs. 100 and upwards can only be transferred by a registered instrument, it is impossible to apply this doctrine consistently with and not in violation of the provisions of the Indian statute.

(1) (1899) 1 Ch. Div. 440. (2) (1914) A.C. 398.

In *Ariff* v. *Jadunath Majumdar* (1), Lord Russell of Killowen at page 101 observes :

" Whether an English equitable doctrine should in any case be applied so as to modify the effect of an Indian statute may well be doubted ; but that an English equitable doctrine affecting the provisions of an English statute relating to the right to sue upon a contract, should be applied by analogy to such a statute as the Transfer of Property Act and with such a result as to create without any writing an interest which the statute says can only be created by means of a registered instrument, appears to their Lordships, in the absence of some binding authority to that effect, to be impossible."

Again at page 104 the following passage occurs :

" Their Lordships do not understand the *dicta* to mean that equity will hold people bound as if a contract existed, where no contract was in fact made ; nor do they understand them to mean that equity can override the provisions of a statute and (where no registered document exists and no registrable document can be procured) confer upon a person a right which the statute enacts shall be conferred only by a registered instrument."

See also *Currimbhoy & Co., Ltd.* v. *Creet* (2) ; *Pir Bakhsh* v. *Mahomed Tahar* (3) and *Ma Kyi* v. *Ma Thon and another* (4).

It is unnecessary to enter into an exhaustive examination of case law to see whether the facts of the present case lend themselves to the application of the equitable doctrine of subrogation. It is sufficient to say that, having regard to the principles enunciated in *Ariff* v. *Jadunath Majumdar* (1), to allow the equitable doctrine of subrogation to prevail would be " to nullify the provisions of the Indian Code relating to property and transfers of property."

(1) (1931) 58 I.A. 91.
(2) (1932) 60 I.A. 297.
(3) (1934) 61 I.A. 388.
(4) (1935) I.L.R. 13 Ran. 274.

1935

THE BANK OF CHETTINAD, LIMITED v. MA BA LO.

SEN, J.

It was finally contended that the appellant bank was entitled to priority because the 11th, 12th and 13th respondents did not ask for, or keep the title-deeds of, the properties and thus enabled the mortgagor to raise money from the appellant bank on them. There are two answers to this: In the first place, all that the Transfer of Property Act requires for the creation of a mortgage is a writing duly executed, attested and registered. It imposes no obligation on a mortgagee who takes a registered deed of calling for and retaining the title-deeds of the properties mortgaged.

In the next place an enquiry for title-deeds would have on the appellant's own showing only disclosed that the title-deeds were held as security by the S.R.M.M.A. Firm but would not have entitled the respondents to their possession.

In the case of the *Imperial Bank of India* v. *U Rai Gyaw Thu & Co., Ltd.* (1), the title-deeds had throughout been in the possession of the bank, yet the bank failed to obtain priority in respect of any advances made subsequent to the coming into existence of a registered mortgage. The question was fully discussed by Page, J., as he then was, in *Lloyds Bank, Limited* v. *P. E. Guzdar & Co.* (2). At page 882 his Lordship observes:

"In India where, except as provided by statute, no distinction exists in the status of mortgages, in like manner, apart from statute, no distinction is made in the rules that regulate their priority. It behoves an Indian Court, therefore, to interpret section 78 in the light of the conditions prevailing in India, and not to put a forced or peculiar construction upon the terms used in the section through attaching undue importance to the meaning attributed to similar words by English Courts *diverso intuitu*, and in circumstances that do not obtain in India."

(1) (1923) I.L.R. 1 Ran. 637. (2) (1929) I.L.R. 56 Cal. 868.

At page 883 there appears the following passage:

"Before a prior mortgage can be postponed under section 78 the Court must be satisfied that the subsequent encumbrancer was induced directly and not remotely to advance money on the security of the property by reason of the gross neglect of the prior mortgagee."

At page 885 his Lordship observes:

"Or again, where the prior mortgagee has surrendered the title-deeds to the mortgagor, but the prior mortgage had been registered and a later prospective encumbrancer by searching the register would thus be in a position, if he made reasonable enquiry, to discover its existence, the Court would, I conceive, be slow to hold that the prior mortgagee had been guilty of 'gross neglect,' or that the action of the prior mortgagee in failing to retain possession of the title-deeds had in any direct way caused or induced the later encumbrancer to advance money on the security of the property."

In the result this appeal fails and is dismissed with costs to the 11th, 12th and 13th respondents only.

BAGULEY, J.—I agree.