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MYA BU and BAGULEY, JJ.

principle has been affirmed in *Bimalanandan Prasad* v. *The United Refineries, Limited, and others* (1).

In the present case both Courts have found that as a matter of fact the transfer of the land in question was fraudulent, and against this finding of fact no second appeal lies. The appeal is, therefore, dismissed with costs.

APPELLATE CIVIL.

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

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Nov. 28

SEIN HTAUNG

v.

V.E.A. CHETTYAR FIRM.*

Appeal to His Majesty in Council—Civil Procedure Code (Act V of 1908), s. 109 (c)—Point of law of general public importance—Accession to mortgaged property—Accession made by mortgagor or any other person—Prima facie *meaning—Imperilling mortgagee's security—Transfer of Property Act (IV of 1882 and XX of 1929), s. 70.*

A Court ought not to grant a certificate under s. 109 (*c*) of the Civil Procedure Code unless a point of law is involved in the appeal which is not only substantial as between the parties, but one of general public importance or of such a nature that the decision upon it may govern numerous cases.

It is a matter of general importance that persons concerned in mortgaging property in India generally should be informed whether the words "any accession is made to the mortgaged property" in s. 70 of the Transfer of Property Act mean any accession made to the mortgaged property by the mortgagor and/or his representatives in title, or any accession to the mortgaged property by whomsoever the accession may have been made.

Prima facie the words would include any accession to the property, and if any building erected upon the property or any other accession thereto by a stranger "under a colour of title" or "under a *bonâ fide* title or claim of title" is excluded from the ambit of the section the result will be that a fraudulent mortgagor by allowing some innocent third person to erect a building will be able to imperil, if he does not destory, the value of the security to the mortgagee.

Thakoor Chander v. *Bhattacharjee*, 6 W.R. 228; *Vallabhdas* v. *Development Officer, Bandra*, 56. I.A. 259—*referred to.*

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(1) (1933) I.L.R. 11 Ran. 79.

* Civil Misc. Application No. 70 of 1935 arising out of Civil First Appeal No. 14 of 1935 of this Court.

Hay (with him *Po Han*) for the applicant. An important question of law is involved in the present case, and it is therefore a fit case for appeal to His Majesty in Council. The maxim *quidquid plantatur solo solo cedit* has no application in India, *Thakoor Chander* v. *Ram Dhone* (1); *Narayan Das* v. *Jatindra Nath* (2); *Premji Jivan* v. *Haji Cassum* (3); *Vallabhdas* v. *Development Officer, Bandra* (4). A person putting up a building *bonâ fide* on another person's land which turns out to have been mortgaged to a third party is entitled to remove his structure.

The applicant is not a lessee in the strict sense of the term because his lease has not been registered; but he cannot be regarded as a trespasser for that reason. He is in the position of a tenant, and the principle enunciated in s. 108 of the Transfer of Property Act should be applied by way of analogy.

Further, the construction of s. 70 of the Transfer of Property Act is involved in this case. The term "accession" to mortgaged property in that section cannot be deemed to include all accessions to mortgaged property irrespective of whether they have been made by the mortgagor or a third party.

In *Lala Beni Ram* v. *Kundan Lall* (5) special leave to appeal was given in similar circumstances.

Clark for the respondent. S. 70 of the Transfer of Property Act makes no distinction between accessions to mortgaged property made by the mortgagor or a third party. All accessions accrue for the benefit of the mortgage, because if it be otherwise the security will be impaired to a great extent. Moreover, according to the applicant's own showing, his title is derived

(1) 6 W.R. 228.
(2) I.L.R. 54 Cal. 669.
(3) I.L.R. 20 Bom. 298.
(4) 56 I.A. 259.
(5) 26 I.A. 58.

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from the mortgagor, and therefore he is merely a representative of the mortgagor so as to be included in the definition of the latter term (s. 59A). *Mannu Mal* v. *Ram Chandra* (1) is the only case directly in point.

Under the Transfer of Property Act, as amended in 1929, registration is notice, and the applicant cannot contend that his action in advancing money for the erection of the structure was *bonâ fide*. His claim arose after the mortgage.

Further, s. 109 of the Code of Civil Procedure does not permit a certificate being granted where the property in dispute is capable of money valuation, and is less than Rs. 10,000. *Banarsi Prasad* v. *Kashi Krishna* (2); *Radhakrishna Ayyar* v. *Swaminatha Ayyar* (3). The question involved in this case is not of general importance, *Jivangiri Guru* v. *Gajanan Narayan* (4), but merely affects the parties.

Hay in reply. All the questions raised in this case, namely, whether the fact that registration is notice affects *bonâ fide* claimants like the applicant, whether s. 70 refers to all accessions to mortgaged property, and whether the applicant has the right to remove his structure within a reasonable time, are of general importance, and therefore a certificate of fitness ought to issue.

PAGE, C.J.—This is an application for a certificate granting leave to appeal to His Majesty in Council. It is common ground that, although the amount of the subject matter in dispute at the trial was over Rs. 10,000, the amount or value of the subject matter involved in the appeal to His Majesty in Council is

(1) I.L.R. 53 All. 334.
(2) I.L.R. 23 All. 227.
(3) I.L.R. 44 Mad. 293.
(4) I.L.R. 50 Bom. 753, 75

only Rs. 4,000. It follows that the appeal does not fall within section 110 of the Code of Civil Procedure. It is contended, however, that it falls within section 109 (*c*) of the Code, and that a certificate ought to be granted upon the ground that the decree is a fit one for appeal to His Majesty in Council.

Now, a Court ought not to grant a certificate under section 109 (*c*) unless a point of law is involved in the appeal which is not only substantial and important as between the parties, but one of general public importance or of such a nature that the decision upon it may govern numerous cases.

The facts, so far as material, are that a mortgage of certain property was created in favour of the respondent. The mortgage included not only the land but all buildings thereon. At the time of the mortgage there was a residential house on the mortgaged land. That house was destroyed by fire. The applicant for leave to appeal appears to have financed the mortgagor to enable him to erect another house upon the site. That was done, and the second house was also destroyed by fire. The date of the mortgage was the 27th April, 1929. On the 13th October, 1931, the mortgagor made an agreement with the applicant, who was impleaded as a defendant in the suit, under which, we understand, the applicant was to be at liberty to erect a house upon the land and to obtain a tenancy of that house so long as the house should remain in existence. That was a lease which admittedly required registration, but it was not registered and therefore no valid or effective lease in the above sense was created in favour of the applicant. In a suit upon the mortgage a decree was passed not only against the mortgagor but also against the applicant upon the ground that the house which the applicant had erected upon the land was

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an accession to the mortgaged property within section 70 of the Transfer of Property Act. In the course of his judgment Baguley J. laid down that

"the wording of section 70 is perfectly clear. Nothing is said about accessions to the mortgaged property being made by the mortgagor or the mortgagee."

Now, the question that falls for determination in the present proceedings is whether the words "any accession is made to the mortgaged property" in section 70 of the Transfer of Property Act mean any accession made to the mortgaged property by the mortgagor and/or his representatives in title, or any accession to the mortgaged property by whomsoever the accession may have been made. That is a question which, to my mind, is one of great public importance, having regard to the existing law in India and the large number of cases which must be affected by it and in respect of which the present case will form a precedent. It is manifest that the word "accession" in section 70 is in general terms, but it is argued on behalf of the applicant that such a construction would not be in accordance with well-settled principles of law in India, and that the word "accession" does not include something erected on the land by a stranger to the mortgage under a *bonâ fide* title or claim of title. In support of this contention a number of cases were cited, but I think that it will suffice if I refer to two ;—*Thakoor Chander Poramanick and others* v. *Ramdhone Bhattacharjee* (1) and *Vallabhdas Naranji* v. *Development Officer, Bandra* (2). In the earlier case Peacock C.J. observed :

"We have not been able to find in the laws or customs of this country any traces of the existence of an absolute rule

(1) 6 W.R. (Civil Rulings) 228. (2) (1929) 56 I.A. 259.

of law that whatever is affixed or built on the soil becomes a part of it, and is subjected to the same rights of property as the soil itself."

And later in the same judgment his Lordship added :

"We think it clear that, according to the usages and customs of this country, buildings and other such improvements made on land do not, by the mere accident of their attachment to the soil, become the property of the owner of the soil ; and we think it should be laid down as a general rule that, if he who makes the improvement is not a mere trespasser, but is in possession under any *bonâ fide* title or claim of title, he is entitled either to remove the materials, restoring the land to the state in which it was before the improvement was made, or to obtain compensation for the value of the building if it is allowed to remain for the benefit of the owner of the soil,—the option of taking to the building, or allowing the removal of the material, remaining with the owner of the land in those cases in which the building is not taken down by the builder during the continuance of any estate he may possess."

I am bound to say, with the greatest respect for anything that fell from Peacock C.J., that I find that a hard saying, for if such a principle is applied in the construction of section 70 the result may be that a mortgagor by allowing some innocent third person to erect a building upon the mortgaged land will imperil, if he does not destroy, the value of the security, and thereby do great injustice to the mortgagee. I find it difficult myself to understand what differentiation in law can be made between a trespasser and a person *de facto* in possession but who has no title to be in possession of property, however *bonâ fide* he may claim that he has a title ; indeed, I have difficulty, with all due deference, in apprehending what is meant by the expression "*bonâ fide* title or claim of title" as used by Sir Barnes Peacock in this connection. This question, however, was referred to by the Judicial

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Committee of the Privy Council in the second case to which I have referred, and Lord Carson in delivering the judgment of the Board observed :

"It was agreed on both sides that the English law as comprised in the maxim '*Quidquid plantatur solo solo cedit*' has no application."

After citing the judgment of Peacock C.J., Lord Carson continued :

"The question is, what is meant by a 'mere trespasser' as contradistinguished from possession under 'any *bonâ fide* title or claim of title'."

And in connection with the facts of the case then before the Judicial Committee his Lordship added that :

"The learned counsel for the respondent, whilst contending that such was not the true state of facts, and that the Government officials could not be considered mere trespassers, was prepared to argue that, even if it were so, once it was admitted that the English maxim did not apply, the logical consequence followed that in any case of trespass by building on the lands of another, the trespasser had a right to remove the structure or be paid the value thereof by the owner, and he relied upon the fact that no case drawing a distinction in the nature or degree of the trespass could be found. Their Lordships, however, do not think it necessary to give a decision upon this far-reaching contention. They agree with what was apparently the view of both Courts in India that under the circumstances of this case, as already set forth, by the law of India, which they appear to have correctly interpreted, the Government officials were in possession 'not as mere trespassers' but under such a colour of title that the buildings erected by them on the land ought not to be included in the valuation as having become the property of the landowner."

Now, it is to my mind a matter of general importance that persons concerned in mortgaging property in India generally should be informed whether the

words "any accession is made to the mortgaged property" in section 70 of the Transfer of Property Act bear the meaning that *prima facie* is to be attributed to them and include any accession to the property, or whether any building erected upon the property or any other accession thereto by a stranger "under a colour of title" or "under a *bonâ fide* title or claim of title" is excluded from the ambit of the section, because if section 70 is to be construed in the latter sense it appears to me that the door is open for fraudulent mortgagors to go some way, by taking advantage of innocent third persons, towards destroying the value of the mortgage security.

For these reasons, in my opinion, the present case is one in which the Court ought to issue a certificate granting leave to appeal to His Majesty in Council under section 109 (*c*) of the Code of Civil Procedure, and a certificate will issue accordingly. Costs ten gold mohurs will abide the result of the appeal.

MYA BU, J.—I agree.