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proceedings under s. 89 of the Transfer of Property Act were in the nature of proceedings in execution of a decree passed under s. 88. That, no doubt, is the opinion of the majority of the Full Bench, but with all respect for their opinion, we agree with the learned Chief Justice of Madras and Mr. Justice Moore, who took the opposite view. That being so, s. 253 of the Code of Civil Procedure is no bar to the Court's inquiring into the plea of payment raised by the mortgagor in satisfaction of the decree *nisi* made under s. 88 of the Transfer of Property Act.

Then, as for the contention that in this view of the matter s. 244 of the Code of Civil Procedure was inapplicable to the case, and the appeal to the lower Appellate Court was therefore incompetent, it is sufficient to say that an appeal lay to the [654] lower Appellate Court against the order absolute that was made by the first Court under s. 540 of the Code as an appeal from an original decree.

It was urged that the appeal that was preferred to the lower Appellate Court was preferred as an appeal from an order and not as an appeal from a decree, and that the proper court-fee for an appeal from a decree was not paid. We think that it is a sufficient answer to this objection to say that it is met by the provisions of s. 573 of the Code of Civil Procedure; the error of the lower Appellate Court in entertaining the appeal being one which did not affect the jurisdiction of that Court or the merits of the case.

The result, then, is that the appeal fails and must be dismissed without costs, no one appearing for the respondent.

Appeal dismissed.

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ORIGINAL CIVIL.

Before Mr. Justice Amcer Ali.

JOGINEE MOHUN CHATTERJEE v. BHOOT NATH GHOSAL.*
[15th, 16th, 21st & 29th April, 1902.]

Registration—Mortgage—Registration Act (III of 1877), ss. 17, 18, 28, 49—Registration of documents—Jurisdiction to register documents—Effect of registration by an officer not having jurisdiction—Mortgage security, ineffectuality of, by reason of defective registration—Money-decree—Limitation.

Where registration of a deed has been effected by a Registrar having no jurisdiction in that behalf under s. 28 of the Registration Act (III of 1877), the document is not effective for the purpose for which it is created.

The Sub-Registrar of Sealdah registered a mortgage deed, dated October 10, 1896, purporting to hypothecate an immoveable property within the area of the Sealdah Registration Office. In the suit, brought on August 31, 1901, for the enforcement of the mortgage bond, the defendant contended, *inter alia*, that no such property as described in the deed ever existed; and no satisfactory evidence having been given as to its existence:

[655] *Held*, that the document could not take effect as a mortgage bond, but it being registered, the plaintiff's claim was not barred, though the suit was brought more than three years after the date of execution of the deed; and the plaintiff was entitled to a money-decree for the whole amount secured by the deed with interest at the contract rate.

Baij Nath Tewari v. Sheo Sahoy Bhagut (1) and *Beni Madhab Mitter v. Khair Mondul* (2) relied upon. *Ram Coomar Sen v. Khoda Newaz* (3) commented upon.

* Original Civil Suit No. 686 of 1901.

(1) (1891) I. L. R. 18 Cal. 556.
(2) (1887) I. L. R. 14 Cal. 449.

(3) (1880) 7 C. L. R. 223.

ON August 31, 1901, the plaintiff, in his capacity as Receiver of the estate of one Nobin Chunder Gangooly, brought this action against the defendant Bhoot Nath Ghosal, for the recovery of Rs. 1,000 with interest due on a registered mortgage bond, in Bengali, dated October 10, 1896.

The defendant, apparently leading an extravagant life, borrowed from the said Nobin Chunder Gangooly, a retired Subordinate Judge, since deceased, the sum of Rs. 1,000 repayable at the end of one year from the date of the loan, together with interest at the rate of 24 per cent. per annum, and, in security thereof, executed a mortgage bond, a Bengali instrument, on October 10, 1896, hypothecating certain immoveable properties, both within and outside the jurisdiction of this Court. One of the properties thus hypothecated was described as follows :—

“ No. 1.—The undivided one cottah four chittacks of land, more or less, comprising premises No. 251-2, Upper Circular Road, Holding No. 49, Sub-division XIV, Division II, mauza Manicktolla, thanah Manicktolla, Sub-Registry Sealdah, Dehi Panchannagram, district 24-Parganas ; whereof four boundaries :—North and east, Narain Desmukh and others, undivided land ; south, Nemye Chand Mullick's tenanted land ; and west, Upper Circular Road ; and in respect whereof the annual rent of Re. 0-4-8 is payable into the Collectorate of Alipore.”

And upon the basis of this property the mortgage deed was registered at the Sealdah Sub-Registrar's Office.

Nobin Chunder Gangooly died on October 10, 1898, leaving a will. In December 1900, certain beneficiaries under that will brought a suit for the administration of Nobin Chunder's estate, and by an interlocutory order therein made, on January 21, 1901, the plaintiff, an advocate of this Court, was appointed Receiver of the said estate, who brought the present suit for the amount due under the bond.

[656] The defendant admitted the execution of the deed, but pleaded that the transaction was a fraudulent one ; that he did not receive full consideration upon the bond which he understood to be only a money-bond ; that he never had any right, title or interest in the properties alleged to have been mortgaged by him ; that the property described in the bond as 251-2, Upper Circular Road, was never owned or possessed by him, and the very existence of it was still unknown to him ; and that this property was fraudulently introduced in the document so that it might pass through the formalities of registration in a Suburban Registration Office.

At the trial no reliable evidence was adduced regarding the existence of the property described in the mortgage deed as 251-2, Upper Circular Road, within the jurisdiction of the Sealdah Registration Office.

Mr. *Avetoom* (with him Mr. *S. C. Mookerjee*) for the defendant. The mortgage deed on which this suit is based is not a valid document. The deed was registered by the Sub-Registrar of Sealdah on the supposition that the premises No. 251-2, Upper Circular Road, were within his jurisdiction. We deny the very existence of any such property ; and as a matter of fact there being no such property, the Sub-Registrar of Sealdah had no jurisdiction to register the deed hypothecating that property ; and it therefore cannot take effect as a mortgage bond ; see *Beni Madhab Mitter v. Khatir Mondul* (1) and *Baij Nath Tewari v. Sheo Sahoy Bhagut* (2). The mortgage of an immoveable property not being effective for want of registration, the plaintiff has to fall back upon the covenant entered into by the defendant, of a mere personal nature ; and under the law a suit on a personal covenant has to be brought within three years

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(1) (1887) I. L. R. 14 Cal. 449.

(2) (1891) I. L. R. 18 Cal. 556.

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from the date of such covenant. This suit having been brought more than three years after the execution of the mortgage-deed, the plaintiff's claim is altogether barred by limitation; and it should therefore be dismissed with costs.

Mr. *Sinha* (with him Mr. *N. Chatterjee*) for the plaintiff. As to the question whether this mortgage deed is a valid [657] registered document, I submit that, as the defendant himself made the representation, that such a property as 251-2, Upper Circular Road, did exist, it is not open to him now to take the objection that the registration was invalid on the ground that such a property never existed. No evidence has been adduced by the defendant, the *onus* of proof being on him, to shew that such property was not in existence when the deed was executed, except that there are no such premises bearing the Municipal number 251-2. That number might have been given in the deed through a mistake. Merely to say that there are no premises No. 251-2, Upper Circular Road, is not sufficient to shew that no such property ever existed within the jurisdiction of the Registrar of Sealdah.

The registration of a deed by a Registrar not having jurisdiction in that behalf does not vitiate the deed: see *Ram Coomar Sen v. Khoda Newaz* (1); *Har Sahai v. Chunni Kuar* (2). A document bearing the certificate showing that it has been registered must be treated as a valid registered document: see *Ikbāl Begam v. Sham Sundar* (3); *Husaini Begam v. Mulo* (4); *Hardei v. Ram Lal* (5); *Sah Mukhun Lall Panday v. Sah Koondun Lall* (6); *Mohammed Ewaz v. Birj Lall* (7).

In the present case the defendant himself presented the deed for registration; and it was his device, with or without the assistance of others, to defraud; and he cannot be allowed to take advantage of his own fraud, nor is it open to him now to say that the property mortgaged by him did not belong to him. If he cannot allege that his statement was false at the time of the registration, he cannot be allowed now to raise the question of the Registrar's jurisdiction. On the evidence, if there was any fraud, it was the fraud by the defendant. The case of *Baij Nath Tewari v. Sheo Sahoy Bhagut* (8) referred to by the other side is distinguishable from the present one.

With regard to the question of limitation, if the document be not held valid in creating a mortgage security, it is not [658] invalid so far as a registered covenant is concerned; and the plaintiff's claim is not barred, the period of limitation in such cases being six years: see Art. 116, Sch. II to the Limitation Act.

Mr. *Avetoom* in reply.

Cur. adv. vult.

AMEER ALI J. The circumstances which have given rise to this suit are shortly as follows. One Nobin Chunder Gangooly, who was at one time a member of the Subordinate Judicial Service, and after his retirement from office as Subordinate Judge, had taken to the more profitable business of a money-lender, advanced to the defendant Rs. 1,000 upon the bond which forms the basis of the present action.

(1) (1880) 7 C. L. R. 228.

(2) (1881) I. L. R. 4 All. 14.

(3) (1882) I. L. R. 4 All. 894.

(4) (1882) I. L. R. 5 All. 84.

(5) (1889) I. L. R. 11 All. 319.

(6) (1875) 15 B. L. R. 228; L. R. 2 I. A. 210.

(7) (1877) L. R. 4 I. A. 166.

(8) (1891) I. L. R. 18 Cal. 556.

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Mr. J. M. Chatterjee is now acting as Receiver to the estate of Nobin Chunder Gangooly, and as such Receiver he has brought the present action for the amount claimed to be due under the bond.

The bond which is dated the 10th of October 1896 is a registered document and purports to hypothecate two pieces of property as security for the debt.

The defendant, a Bengali youth who gives his age as 22 or 23, denies having received full consideration upon the bond, and he practically states that he was induced by people, who were more or less in league with Nobin Chunder Gangooly, to enter into this transaction.

He has also given his evidence, and in his deposition he asserts that at the time of the execution of the document, he understood it only to be a money-bond and not a mortgage deed; with that I will deal presently.

Upon the evidence of the witnesses, who have been examined on the part of the plaintiff, I have no doubt that Nobin Chunder Gangooly did advance Rs. 1,000 to Bhoot Nath Ghosal, the defendant, although a considerable sum out of that amount went into the hands of the vakil and the broker by way of their remuneration.

Booth Nath Ghosal's allegation is that the vakil Ganendra Chunder Mookerjee gave him only Rs. 100 and kept the remainder himself. Ganendra Chunder Mookerjee, who besides being a vakil of this Court, is also a professor in the General [659] Assembly's Institution, swears that he received from Khetter Nath Banerjee, who represented Nobin Chunder Gangooly, the Rs. 1,000, and at the Registration office at Sealdah gave to the plaintiff Rs. 900; that is, Rs. 1,000 less Rs. 100, his own fee.

Mon Mohun Gangooly, the broker, says he received Rs. 50 for his remuneration. They both speak as to the cashing of two notes by the defendant that night.

The suggestion made on behalf of the defendant that he was taken by the pleader to a chemist's place in Nimitollah Street, is contradicted by those witnesses, and I believe there is no foundation for the suggestion.

The defendant upon his own account seems to have led a rather dissipated life and was given to a great deal of extravagance at the instigation of his companions. I believe the evidence of the pleader Ganendra Chunder Mookerjee and the two other witnesses called for the plaintiff in preference to that of Bhoot Nath Ghosal with regard to his receipt of Rs. 850 out of the Rs. 1,000 advanced by Nobin Chunder Gangooly.

Rupees 150 were, according to these men's statements, actually disbursed by him. I must therefore hold him liable for the amount of the debt.

The question, however, is—what is the nature of the document upon which the suit has been brought? It purports to be a mortgage deed and hypothecates two pieces of property—one situated within the jurisdiction of the Registrar of Calcutta, and the other within that of the Sub-Registry Office of Sealdah. It is upon the basis of this latter property that the document was registered at the Sealdah Registration Office.

The defendant's contention is that there was no such property in Sealdah, and that, as it was registered by the Registrar of Sealdah without any jurisdiction in that behalf, the document cannot take effect as a mortgage deed.

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Mr. *Sinha* on behalf of the plaintiff contends that, inasmuch as the document has been registered, the entry by the Registrar upon the deed is conclusive as to the validity of the Registration. This position seems to me to be untenable.

[660] Section. 17 of the Registration Act III of 1877 declares what documents shall be registered.

Clause (b) is to this effect :—

“Other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent of the value of one hundred rupees and upwards to or in immoveable property.”

S. 59 of the Transfer of Property Act provides that—

“Where the principal money secured is one hundred rupees or upwards a mortgage can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses.”

S. 28 of the Registration Act deals with the place of registration and runs as follows :—

“Save as in this part otherwise provided, every document mentioned in s. 17, clauses (a), (b), (c), and (d), and s. 18, clauses (a), (b), and (c), shall be presented for registration in the office of a Sub-Registrar within whose sub-district the whole or some portion of the property to which such document relates is situate.”

S. 49 declares that—

“No document required by s. 17 to be registered shall affect any immoveable property comprised therein, or confer any power to adopt, or be received as evidence of any transaction affecting such property, or conferring such power, unless it has been registered in accordance with the provisions of this Act.”

In view of these provisions this Court has held that where registration has been effected by a Registrar who had no jurisdiction in that behalf under s. 28 of the Act, the document is not effective for the purpose for which it is created. In the case of *Beni Madhab Mitter v. Khatir Mondul* (1), Mr. Justice Mitter held that although “under s. 60 the certificate is admissible in evidence to prove that the document was duly registered by the particular officer whose signature it bears, it having been shewn that that officer had no jurisdiction to register it, the document was not duly registered within the provisions of the Registration Act.”

The learned Judges referred to the case of *Ram Coomar Sen v. Khoda Newaz* (2), and after showing that the authority on which that decision purported to be based was not in support of the conclusion therein arrived at, they differed from the decision [661] in question and held as I have mentioned. The same question came up before a Full Bench in the case of *Baij Nath Tewari v. Sheo Sahoy Bhagut* (3). There the property was described in the bond as bearing a certain towjee number paying certain jumma and as lying within the jurisdiction of a certain Kotwali, sub-district Bhagalpore. That description was found to be erroneous, the property in reality being situated in the sub-district of Bankura, where the document ought to have been registered. Instead of being registered there it was registered by the Sub-Registrar of Bhagalpore, who exercised and performed the powers of the Registrar of Bhagalpore, to whom also the Sub-Registrar of Bankura was subordinate. In that case all the Judges agreed in holding that registration made in contravention of the provisions of the Registra

(1) (1837) I. L. R. 14 Cal. 449.

(2) (1880) 7 C. L. R. 228.

(3) (1891) I. L. R. 18 Cal. 556.

tion Act would be invalid. Petheram, C. J., alone was of opinion that, inasmuch as the document had been registered by the Sub-Registrar of Bhagalpore, who exercised and performed the duties of the Registrar of Bhagalpore and to whom the Sub-Registrar of Bankura was subordinate, the want of jurisdiction in that particular case might be regarded as removed, but the words of Petheram, C. J., in dealing with the general question are important. He says at page 565, I. L. R. 18 Cal.—I would reply to the question referred, that, if the office in which the registration was effected was not an office constituted for the registration of documents relating to property in the area within which the property to which the document in question related is situated, no registration has been effected within the provisions of the Act." Mr. Justice Pigot also said: "It appears to me that a false description or an incomplete description of the property in respect of matters which from their nature it lies upon the party registering the document to state being especially within his knowledge, must invalidate the registration, if it be such as to render the description of the property insufficient to identify it."

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Whatever might have been the view expressed in *Sheo Sunker Sahoy v. Hardey Narain Sahu* (1) and *Ram Coomar Sen v. Khoda Newaz* (2), it is quite clear from the Full Bench decision in [662] *Bairj Nath Tewari v. Sheo Shahoy Bhagut* (3) and the decision of Mitter and Beverley, JJ., in *Beni Madhab Mitter v. Khatir Mundul* (4) that the legal effect which learned counsel for the plaintiff wishes me to attach to the registration endorsement by the Registrar cannot be given, unless the registration was effected in accordance with the law; in other words, by an officer who had jurisdiction to register the document. The decision of this matter depends upon the question of fact, whether there was that property within the area of the Sealdah Registration Office so as to give jurisdiction to the Sub-Registrar of Sealdah.

The plaintiff has produced a document which purports to be a conveyance or deed of sale in respect of one cottah and four chittacks of land by one Narain Chunder Desmukh to Bhoot Nath Ghosal, the defendant, and this is the property which is included in the bond upon which the suit is brought, and it is upon the basis of this property, that it was registered in the Sealdah Sub-Registration Office. There is no other evidence besides this deed of sale which bears date some time in September 1896 to show that there was this property belonging to the defendant in that locality. The defendant has sworn that he has no property No. 251-2, Upper Circular Road, which is the number given in the deed of sale. A clerk from the Municipal Office has been called, who also swears that in the books of the Municipality there is no property bearing No. 251-2 in Upper Circular Road, he also swears that had there been any such property it would have appeared in his books.

The defendant had also called a man of the name of Annoda Prasad Ghose, the manager of one Babu Baman Das Mukerjee, who states that he has known No. 251, Upper Circular Road, for the last five or six years, that he can give its boundaries, and that there is no such property as No. 251-2 there. In cross-examination he stated "my master's dwelling-house is 97, Baranassy Ghose's Street. Narain Chunder Desmukh does not claim any property in Upper Circular Road. He has told me so."

(1) (1879) 5 C. L. R. 194.
(2) (1880) 7 C. L. R. 223.

(3) (1891) I. L. R. 18 Cal. 556.
(4) (1887) I. L. R. 14 Cal. 449.

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It will be noticed that by the deed of sale Narain Chunder Desmukh purported to sell out of his property only one cottah [663] and four chittacks, thus leaving the remainder in his own possession, and, if the statement of Annoda Prasad Ghose be true, then Narain Chunder Desmukh had no property in Upper Circular Road at all. Therefore, although the deed of sale put in by the plaintiff, which it is said was received by Nobin Chunder Gangooly from the defendant himself, is a piece of evidence regarding the existence of the property, that evidence is in my opinion not conclusive and has been rebutted by the evidence given on the part of the defendant.

Over and above that, the signature of Narain Chunder Desmukh on the deed of sale of one cottah and four chittacks is not beyond suspicion.

Considering the age of the defendant and the date which the document bears, it does seem strange that he should have been buying this property in 1896.

On the whole, therefore, I am not satisfied that there was any such property as No. 251-2 belonging to the defendant within the jurisdiction of the Sub-Registrar of Sealdah so as to give him under s. 28 of the Registration Act jurisdiction to register the document.

If I am right in that conclusion, it follows that the document cannot take effect as a mortgage deed; but, as it is registered, although the suit has been brought more than three years after the date of execution, the claim is not barred as was contended for by the defendant's counsel.

I therefore make a decree in favour of the plaintiff on the bond for the entire amount secured by it, Rs. 1,000, with interest at the contract rate.

Considering the facts of the case I am justified in giving interest at the same rate during the pendency of the suit. Interest on decree at 6 per cent.

Attorney for the plaintiff: *M. M. Chatterjee.*

Attorney for the defendant: *S. D. Banerjee.*

29 C. 664.

[664] PRIVY COUNCIL.

PRESENT :

Lords Macnaghten and Lindley, Sir Ford North, Sir Andrew Scoble, and Sir Arthur Wilson.

SHAM KOER v. DAH KOER AND RUPAN KOER v. DAH KOER.

TWO APPEALS CONSOLIDATED. [30th April and 5th June, 1902.]

[On appeal from the High Court at Fort William in Bengal.]

Limitation—Adverse Possession—Hindu Law—Widow—Mitakshara Law—Possession of widows in undivided Hindu family—Suit by reversionary heirs to set aside assignment by widows and for possession—Evidence of arrangement between widow and reversioners.

On the death in 1862 of a member of an undivided Hindu family governed by the Mitakshara Law, his widow and his son's widow obtained possession of a portion of his property, which in 1884 was assigned by *hibanama* to a third person. In 1891 the reversionary heirs brought a suit against the survivor of the widows and her assignee to set aside the *hibanama* and for possession:—