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agent cannot plead that by reason of the money having been collected under an unlawful agreement which had been made between the principal and the person from whom the money was collected, he is not liable to account for the money to the principal.

We must therefore set aside the judgment of the Lower Appellate Court and hold that the defendant is liable to pay to the plaintiff any sums collected by the defendant as *khurcha*.

It has been pointed out to us that in these circumstances the case must go back to the First Court, for the Munsif disallowed certain sums for which the defendant produced receipts (A and B) and which he claimed to have paid to the plaintiff's *naib* as *khurcha*. The Munsif held that *khurcha* could not be taken into account at all. If, however, the defendant is liable for *khurcha*, he is entitled to credit for sums paid by him on this account.

We accordingly set aside the decree of the Lower Appellate Court and remand the case to him. The account must now be gone into again, taking *khurcha* into account, on both sides.

The appellant is entitled to his costs in this appeal.

Appeal allowed. Case remanded.

30 C. 1016 (=13 M L J 320=30 I. A. 230=7 C. W. N. 861=5 Bom. L. R. 975=8 Sar. 551.)

[1016] PRIVY COUNCIL.

MAUNG PO HTI v. MAHOMED CASSIM.*
[24th June, 1903.]

[On Appeal from the Chief Court of Lower Burma.]

Partnership—Deed of partnership—Registration Act (III of 1877), s. 17, cls. (b) and (h)—Clause giving one partner only a right of redemption of mortgaged property—Document giving right to obtain another document—Evidence.

A deed of partnership which contained a clause stating that the partnership property was mortgaged, and giving one only of the partners a right of redemption for and during a future period of limited duration, was held to declare a right in immoveable property and therefore to need registration under clause (b) of s. 17 of the Registration Act (III of 1877) to make it admissible in evidence.

[Ref. 89 P. R. 1908=145 P. W. R. 1908.]

APPEAL from a judgment and decree (12th August 1901) of the Chief Court of Lower Burma, reversing the decree (18th February 1901) of the District Court of Amherst and dismissing the appellant's suit.

The plaintiff, Maung Po Hti, appealed to His Majesty in Council.

The suit was one for redemption. The 1st and 2nd defendants were the mortgagees members of a Moulmein money-lending firm. The 3rd and 4th defendants were the present respondents, Mahomed Cassim and Adjim Mahomed Nacoda. The facts were that in 1889, at Moulmein, the plaintiff had conveyed, for Rs. 15,000, to another firm, certain immoveable property consisting of a saw-mill and appurtenances, on the verbal understanding that it should be reconveyed to him on repayment of the above sum; that, in June 1897, the plaintiff wished to have the

* *Present*: Lord Macnaghten, Lord Davey, Lord Robertson, Sir Andrew Scoble and Sir Arthur Wilson.

saw-mill reconveyed to him, but, being unable to find the money himself, he sought the assistance of the 3rd and 4th defendants, who agreed to find the money for the re-purchase of the mill and also an additional sum of Rs. 1,000 for expenses, on the following terms: (a) that [1017] the mill should be reconveyed in the names of the plaintiff and the 3rd and 4th defendants; (b) that the plaintiff and the 3rd and 4th defendants should raise a loan of Rs. 12,500 from the 1st and 2nd defendants, on a mortgage of the saw-mill and appurtenances; (c) that the 4th defendant should advance Rs. 3,500 to make up the deficiency; (d) that the plaintiff and the 3rd and 4th defendants should work the mill, as partners, for three years and for another year if they should further agree; (e) that the plaintiff should have the right of redeeming the saw-mill and obtaining a reconveyance of it from the 1st and 2nd defendants and the 3rd and 4th defendants at any time after the expiration of three years, and before the expiration of four years; (f) that in the event of his failing to exercise that right within the period stipulated, the 3rd and 4th defendants were to be at liberty to redeem the property and have it conveyed to them only.

In pursuance of the above agreement the saw-mill and appurtenances were, on 16th June 1897, conveyed to the plaintiff, and the 3rd and 4th defendants who mortgaged the same to the 1st and 2nd defendants for Rs. 12,500, and on 25th June 1897, the plaintiff and the 3rd and 4th defendants entered into the partnership agreement of which the necessity or otherwise of registration was the only question on this appeal. That question was raised on the following clause in the agreement:—

“ That the said saw-mill having been mortgaged with one V. R. S. Nagappa Chetty for Rs. 12,500 by the said Maung Po Hti, Mahomed Cassim and Adjim Mahomed Nacoda, the said Mahomed Cassim and Adjim Mahomed Nacoda, their heirs, executors and administrators, respectively, agree and allow that the said Maung Po Hti, his heirs, executors or administrators to redeem the said premises after the expiration of three years or at any time between three and four years from the date of these presents, on payment of Rs. 12,500 to the said V. R. S. Nagappa Chetty, Rs. 3,500 to the said Adjim Mahomed Nacoda and all other sums of money then due and payable by the said P. A. Mahomed Cassim and Company.”

On the 20th June 1900, the plaintiff wished to redeem the mortgaged property, but the 3rd and 4th defendants disputed his right. Hence the suit in which the plaintiff claimed that he was entitled to have the property conveyed to him, on his paying Rs. 12,500 to the 1st and 2nd defendants, and Rs. 3,500 to the 4th defendant, which he was ready and had offered to do.

[1018] The suit was defended only by the 3rd and 4th defendants, the only issue now material being the first:—“ whether exhibit I ” (the partnership agreement of 25th June 1897), “ being unregistered, is admissible in evidence, or in other words, whether it is governed by sub-sec. (b) or by sub-sec. (h) of section 17 of the Indian Registration Act ? ”

As to this issue the District Judge said:—

“ I decide this in plaintiff's favour on the ground that exhibit I very clearly did not give plaintiff any present interest, etc., in the land, but merely gave him a *conditional right*, upon making certain payments within specified limits of time, to *obtain documents of title*. It seems to be a document clearly failing under sub-section. (h).”

In the result he decreed the suit with costs. The 3rd and 4th defendants appealed to the Chief Court of which two Judges (Fox and

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BIRKS, JJ.) heard the appeal and reversed the decision of the District Judge. They said :—

FOX, J. The document was not registered. On the 19th July 1900, the plaintiff instituted the suit out of which this appeal arises, in which he sought to redeem the property, and to have it conveyed to him solely, upon his paying into Court the two sums of Rs. 12,500 and Rs. 3,500 mentioned in the clause above set out. He based his right to have the property re-conveyed to him alone on the above clause, and on his having in the previous month intimated to the 3rd and 4th defendants his readiness and willingness to exercise the right reserved to him of redeeming the property.

The deed of partnership was tendered in evidence, and its admission was objected to on the ground that sec. 49 of the Registration Act precluded its being received as evidence. The learned Judge of the District Court overruled the objection on the ground that the document was not one which was required by section 17 of the Act to be registered. He held that it fell within clause (h), and not under clause (b) of the section for the reasons that "it did not give the plaintiff any present interest in the land but merely gave him a conditional right upon making certain payments within specified limits of time, to obtain documents of title."

In my judgment this decision was erroneous. Clause (b) of the section is not confined to documents which create, etc., a present interest in immoveable property: it includes "non-testamentary documents 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." The learned Judge appears to have had in mind the documents of the title held by the 1st and 2nd defendants, and a reconveyance from them, when he held that the partnership deed fell within clause (h), and was a document "merely creating a right to obtain another document which will when executed, create, declare, assign, limit or extinguish any such right, title or interest," *i.e.*, in immoveable property. [1019] The document to be obtained, however, must, in my opinion, be one to be obtained from a party to the document in question—in this case from the 3rd and 4th defendants—and the words of the clause cannot refer to any document to be obtained from some one who is not a party to the document or the transaction which it embodies.

In considering whether the partnership deed was admissible or not, it strikes me that the plaintiff is on the horns of a dilemma. The right to redeem was vested jointly in the plaintiff and the 3rd and 4th defendants, unless and until by some means such joint right became extinguished. The deed of partnership either operated to extinguish that joint right and (coupled with the exercise of the option) to vest a sole right to redeem in the plaintiff, or it did not do so. If it did, then it must fall within clause (b) of sec. 17 of the Act, and it was inadmissible in evidence. If it did not do so, but merely created a right to obtain another document which would, when executed, extinguish the joint right and vest the sole right to redeem in the plaintiff, then the plaintiff has not obtained that document from the 3rd and 4th defendants and his suit to redeem from the 1st and 2nd defendants was premature. In either case his suit should have failed.

It has been argued that an equity of redemption is not a right, title, or interest to or in immoveable property, but this in my opinion is clearly untenable.

I would allow the appeal and reverse the decree of the Lower Court, and would dismiss the suit with costs.

BIRKS, J. I concur in the judgment just delivered by my learned colleague. I was at first doubtful whether the learned Judge in the Court below was in error in holding that the document did not require registration as coming under clause (h) of sec. 17 of the Registration Act. On a reference to the authorities cited, *Chunilal Panatal v. Bomanji Mancherji Modi* (1), *Hormasji Manekji Dadachanji v. Keshav Purshotam* (2), *Shridhar Baijal Kelkar v. Chintaman Shadashiv Mehendale* (3), *Patel Ranchod Morar v. Bhikabhai Devidas* (4), *Sakharam Krishnaji v. Madan Krishnaji* (5), and *Lakshamma v. Kameswara* (6), I consider that the last ruling is most applicable to the facts. The documents in that case contemplated a future

(1) (1893) I. L. R. 7 Bom. 310.

(2) (1893) I. L. R. 18 Bom. 13.

(3) (1893) I. L. R. 18 Bom. 396.

(4) (1896) I. L. R. 21 Bom. 704.

(5) (1881) I. L. R. 5 Bom. 232.

(6) (1889) I. L. R. 13 Mad. 281.

division of a portion of the property, but did declare existent rights in immoveable property. That appears to be the case here, and that such was the intention of the parties appears clear from the facts that the plaintiff did not consider it necessary to sue for specific performance. Even if it be held that the partnership agreement is admissible under clause (h) as giving the plaintiff a right to claim a release of their shares in the equity of redemption, it is clearly inadmissible in the present suit.

On this appeal,

H. Cowell for the appellant contended that the deed did not require registration to make it admissible in evidence. It did not itself "create an interest in immoveable property" within the [1020] meaning of sec. 17, clause (b) of the Registration Act (III of 1877); but only gave a right to obtain another document under which such an interest could be created. The deed, therefore, it was submitted, fell within clause (h) of sec. 17 as a document expressly excepted from the operation of clause (b). Reference was made to *Chunilal Panalal v. Bomanji Mancherji Modi* (1).

J. Lewis for the respondents was not called upon.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. Their Lordships are of opinion that the judgment of the Chief Court is perfectly right. The partnership agreement of the 25th June 1897, is an instrument falling within section 17, clause (b) of the Indian Registration Act (III of 1877). In one of the clauses of the agreement there is a complete assurance of a right of redemption for and during a future period of limited duration. The clause declares that what, but for this stipulation, would have been the right of the three partners, shall, during that period, be the right of one of the three, exercisable by him for his own sole benefit. That right is a right in immoveable property. The agreement, therefore, ought to have been registered. Being unregistered, it is inadmissible in evidence. If the agreement had been registered, then if the respondents had been content to abide by their bargain, no further assurance from them would have been required; if they had contested the appellant's right, a declaration by the Court of his right as expressed in the agreement would have been sufficient, and it would not have been necessary for the Court to make an order directing the execution of any further instrument.

Their Lordships will therefore humbly advise His Majesty that this appeal ought to be dismissed. The appellant must pay the costs of the appeal.

Appeal dismissed.

Solicitors for the appellant: *Richardson & Co.*

Solicitors for the respondents: *A. H. Arnould & Son.*

30 C. 1021 (=30 I. A. 182=7 C. W. N. 774=5 Bom. L. R. 822=8 Sar. 512)

[1021] PRIVY COUNCIL.

WALIAN v. BANKE BEHARI PERSHAD SINGH.*

[30th April, 1st May and 19th June, 1903.]

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

Guardian—*Guardian ad litem*—*Civil Procedure Code* (Act XIV of 1882), ss. 443, 578—*Absence of formal order appointing guardian*—*Sanction of appointment by*

* Present: Lord Macnaghten, Lord Lindley, Sir Andrew Scoble and Sir Arthur Wilson.

(1) (1883) I. L. R. 7 Bom. 910.

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