[APPELLATE CIVIL.]

Before Mr. Justice Macpherson and Mr. Justice Ainslie.

1871 *Aug.* 14.

IBRAHIM AZIM (DEFENDANT) *v.* W. D. CRUICKSHANK (AGENT BANK OF BENGAL, RANGOON (PLAINTIFF).*

Bank of Bengal—Act IV of 1862, *s.* 30—*Equitable Mortgage—Security—Stamp.*

11 B.L.R. 67.

The prohibition contained in section 30 of Act IV of 1862, which regulates the Bank of Bengal, against making loans and advances on the security of land, is no prohibition against the bank taking land as security for a past loan and an existing debt.

Where title-deeds of land had been deposited by a debtor with the Bank of Bengal, and a letter was given authorizing the bank to sell the land and apply the proceeds in liquidation of a debt then existing and due to the bank, it was held that a valid equitable mortgage was thereby created in favor of the bank as a security for the money due.

The Court declined to entertain the question whether the document relied on was one requiring a stamp, as being a matter not affecting the merits of the case or the jurisdiction of the Court.

THIS suit was instituted in the Recorder's Court, Rangoon, on behalf of the Bank of Bengal, Rangoon Branch, to have certain land which had been purchased by the defendant declared liable to an equitable mortgage in favor of the bank.

Mulla Ahmud, the former owner of the land, being indebted to the Bank of Bengal on over-due bills to the amount of Rs. 46,300 or thereabouts, in September 1868, deposited with the bank the title-deeds of the land in question. It did not appear on the evidence under what circumstances exactly the deposit was made. In December 1868, and from time to time subsequently, he gave the bank Promissory Notes payable on demand or otherwise, for so much of the same debt as from time to time remained due. On the 7th June 1869, the title-deeds being in deposit with the bank, Mulla Ahmud being then indebted to the bank in the sum of 41,100 rupees, came to the bank and signed a letter addressed to Mr. Cruickshank and

* Regular Appeal, No. 87 of 1871, from a decree of the Recorder of Rangoon dated the 4th January 1871.

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written by him, authorizing him to sell the land to which the title-deeds related, and to apply the proceeds in part payment of his debts.

The letter was as follows:

"*Rangoon, 7th June* 1869.

"TO THE AGENT, BANK OF BENGAL, RANGOON.

"SIR,

"I have to request that you will be good enough to sell the under-'mentioned properties (the title-deeds of which are in your hands) "either by public auction or private bargain, and apply the proceeds in 'part payment of my liabilities to the bank, *viz.*" [Here the details are given] "And I hereby bind myself to sign all documents neces-'ary to convey the properties to the purchasers when called upon to do "so It is understood that your right to sue me for the amount of my "liabilities to the bank, and recover the same from any other property "belonging to me or to arrest my person, shall not be prejudiced in "any way by your complying with the above request."

In January 1869 one Bah Pah obtained a decree against Mulla Ahmud with costs in an action for damages. On the 5th of February 1870, the property in question was attached under that decree, and at the sale made under this attachment, Ibrahim Azim, the defendant, appellant, purchased, on the 14th of March 1870, the right, title, and interest of Mulla Ahmud in and to the property in question.

The defence to the present suit was that the defendant had purchased the land at an auction-sale in execution of a decree of the recorder's Court, on the 14th of March 1870; that he had paid Rs. 5,250 which he believed to be the full value of the land; and that the Bank of Bengal was prohibited by section 30 (1) of the Act regulating it, from taking such security as was taken in this case.

The following issues were settled:—

1. Are the plaintiffs equitable mortgagees of the land mentioned in the plaint?

(1) *Act IV of* 1862, *sec.* 30.—"The Directors of the said bank shall not make any loan or advance on shares or consolidated stock of the said bank, nor in mortgage, or in any other manner, on the security of any lands, houses, or immoveable property or the title-deeds relating thereto."

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2. If so, are they entitled to have the same applied, as against the defendant, in satisfaction of their security ?

The learned Recorder in his judgment observed that the advance of money on security of land is not, strictly speaking, the proper business of a bank, but the bank is not by section 30 precluded from taking such security for a balance due, and therefore the security taken by the Bank of Bengal in 1868 was a good security and was not in any prejudiced by any act done since the deposit of the title-deeds was made, nor by the subsequent renewal of the note from time to time. And that, as the defendant brought the land with notice of the mortgage he became a trustee of the land, so far as was necessary to satisfy the encumbrance, and that a deposit of the title-deeds with or without any writing, will create an equitable lien which will prevail against a subsequent purchaser with notice, and as the Indian Registration Act has not been extended to Burmah, the oral agreement with the bank and the deposit of title-deeds raised that lien in favor of the bank. On the subject of purchase with notice, he cited *Whitworth* v. *Gaugain* (1). Accordingly, he made a decree for foreclosure in favor of the bank, unless Ibrahim Azim paid the sum of Rs. 7,000 and costs within one month.

Mr. *Ingram* (with him Baboo *Tulsi Das Seal*) for the appellant, contended that it was contrary to the principles of sound banking business to receive land as security for a loan, and that section 30 Act IV of 1862 prohibited it. No bank would be safe if large or frequent advances were made on the security of land. The bank so dealing might find itself in possession of an enormous quantity of land which it might not be able to dispose of readily and turn into cash to carry on its proper and legitimate business. Hence the law prohibits its accepting a mortgage of land as security. Consequently the plaintiff can derive no benefit whatever from the circumstance of the deposit of the title-deeds as a security. The Act regulating the bank, prohibits the taking of land as security for future advances, but is silent as to past advances, and it will be

(1) 1 Phill., 728, 732-3.

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contended by the respondent's Counsel that the bank is not prevented from taking landed security for debts already incurred. If this contention be correct, it will be easy for the bank to avoid the provisions in that Act which secure their own safety, for they have only to lend money or discount bills at a very short period, and when the period is elapsed, they will then be able to accept land as a security for the debt. Such a system, if proceeded with for any length of time, might tie up all their available capital in securities which could not be realized at short notice—a system clearly inconsistent with the safety of the bank or the security of its shareholders.

The *Advocate-General* for the respondent.—It is a mistake in this case to say that the bank has made any loan or advance on the security of land. That would be contrary to the terms of section 30, Act IV of 1862. The debt here was one already existing on account of a previous loan made without any security. When the bills were over-due and were not paid, the bank accepted the mortgage as a security. There is nothing in this Act or in any other Act to preclude the bank from securing itself from loss after a loan has been made. The mere fact of holding land is not objectionable. Under the 4th section, the bank may "acquire and hold land either absolutely or conditionally for a term or in prepetuity." What is prohibited is that no loan or advance should be made on such security. *Berrington* v. *Evans* (1), which was referred to, differs from this in that there was no deposit of title-deeds, and there was only a personal covenant. In *The National Bank of Australasia* v. *Cherry* (2), the Act provided expressly that land should be taken for past debts, &c., and not for future debts. Here the Act does not expressly authorize the bank to take such security for past advances, but the Court will not infer such a prohibition from the omission. Where there is no prohibition, a thing may be done, if it seems unobjectionable, and promotes the interests of the bank.

Mr. *Marindin* on the same side.—Is there anything in this Act to prohibit the bank from acquiring and conveying land

(1) 1 Y. & C., 434. (2) 3 L. R, P. C., 299.

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as it has done? The 4th section states that "it shall be competent to the bank to acquire and hold either absolutely or conditionally for a term or in prepetuity any description of property and to convey the same." Conditionally means not absolutely, but for the term, as for example, on mortgage. The prohibition is in the 30th section. It merely prohibits the making of a loan on the security of land, not the taking of a security for an existing debt. When the bank has had debts, why should it not do the best it can to secure itself from loss. As to the shortness of time, the letter is an authority to sell.

In *The National Bank of Australasia* v. *Cherry* (1), there was a distinct contravention of the Act, an Act which is still more stringent against making a fresh loan than Act IV of 1862. By the 7th section the Bank of Australasia was authorized to hold land provided it should not be unlawful. They could hold for two purposes, one for offices, and the other for past debts. But the Bank of Bengal can hold generally, and either absolutely or conditionally, with the prohibition that they should not make advances on such securities.

Mr. *Ingram* in reply.

The judgment of the Court was delivered by

MACPHERSON, J.—By the 4th section of Act IV of 1862, "for regulating the Bank of Bengal," the bank is "competent to acquire and hold any description of property whatever, and to transfer and convey the same." Sections 27, 28, and 29 describe what the general nature of the bank's business is to be; section 27 giving the bank power to sell "property and securities deposited in the bank as security for loans and not redeemed, or property or securities recovered by the bank in satisfaction of debts and claims." Section 30 enacts that the bank shall not make any loan or advance on mortgage, "or in any other manner on the security of any land, houses, or immoveable property, or the title-deeds relating thereto."

The object of the present suit, in which the Bank of Bengal was the plaintiff, is to enforce an equitable mortgage, which

(1) 3 L. R., P. C., 299

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is in the plaint stated to have been given to the bank on the 7th of June 1869 to secure a debt. The main question to be decided is, whether the Bank of Bengal, not having power to make any loan or advance on mortgage, or on the security of any immoveable property or the title-deeds relating thereto, has the power to take security of this nature for any debt actually already accrued due.

The equitable mortgage relied on was given by Mulla Ahmud. On the 14th of March 1870, the appellant (defendant in the Court below) purchased the right, title, and interest of Mulla Ahmud in the property the subject of the mortgage, at a sale in execution of a decree against Mulla Ahmud, the property having been attached under that decree on the 5th of February 1870.

The appellant purchased with notice of the mortgage or lien claimed by the bank; but he claims to hold the property free from any such lien, on the ground that the bank acted *ultra vires* in taking such security, and that it is therefore worthless as against him.

It was argued for the bank that, whether the taking such security was *ultra vires* or not, the appellant cannot set up that defence, the provisions of the Act being intended merely for the regulation of the affairs of the bank as amongst the shareholders, or as between them and the directors. But this is not so; and the contrary was decided by the Privy Council in *The National Bank of Australasia* v. *Cherry* (1), a case which in very many respects resembles the case now before us. I have no doubt that if the taking of this security was *ultra vires* as being forbidden by section 30, the appellant has a good defence and is entitled to our judgment.

But, if the security was given to secure a debt already incurred and due, I do not think that the taking it was *ultra vires*. It is one thing to say that the bank shall not make a business of lending money on mortgage of land and the like, and another thing to say that money being actually due and owing to the bank, the bank shall not take the security of land or

(1) 3 L. R. P. C. 209.

other immovable property, or any other kind of good security not expressly prohibited, with a view to its own protection. The original lending of money on the security of immoveable property is quite a different thing (and affects the general position and business of a bank quite differently) from taking such security for a debt due. The forbidding the entering into loan transactions on the strength of such security, does not appear to me necessarily to include a prohibition against taking such security as a protection against loan in respect of a debt due: and in the absence of any express prohibition, I do not see why I should infer an intention to impose it, when very possibly, not to say probably, it was never intended that it should be either expressed or implied. *Prima facie*, a debt having been actually incurred, it appears to me to be clear gain to the creditor to get any security for it, whether by way of mortgage or otherwise; and I think that the taking of such security *bona fide* is within the general scope of the business of the Bank of Bengal, as it is not expressly declared not to be so.

I proceed to consider whether what occurred on the 7th of June 1869 constituted a giving on that date by Mulla Ahmud to the bank, of an equitable mortgage or lien on this property, by way of security for a debt then due from him to the bank, for that is the case stated in the plaint, and relied on before us by the Advocate-General, who appeared for the respondent.

The circumstances are somewhat peculiar and the evidence as to the details of what occurred is remarkably meagre. There is no doubt that, on the 7th of June 1869, the title-deeds in question were in deposit in the bank, and had been so for some considerable time. But we have no precise information as to how, or when, or why they came to be in deposit there. Mr. Cruickshank, the manager of the branch of the Bank of Bengal in Rangoon, says that he took charge of his office on the 1st of April 1869, and that the title-deeds were then in deposit: he cannot say when they were so deposited, but they had been in the bank more than a year; they had been deposited to secure certain bills on which Mulla Ahmud was liable. "The deeds "were desposited after the bills had been discounted; but I can- "not say whether the bills were due at this time. There was

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"perhaps a sum of Rs. 40,000 due by Mulla Ahmud to the "bank at the time. The whole was not covered by the bills." Mr. Pascal, the assistant accountant of the bank, deposes that on the 31st August 1868, Mulla Ahmud owed the bank Rs. 47,300; on the 30th September 1868, he owed Rs. 46,300; and on the 7th of June 1869, Rs. 41,000, the whole amount on each occasion being the balance of over-due bills.

In this state of things, the title-deeds being as a matter of fact in deposit in the bank, and Mulla Ahmud being indebted to the bank in the sum of Rs. 41,100, Mulla Ahmud came to the bank on the 7th of June 1869, was pressed for payment by Mr Cruickshank, and declared himself unable to pay. We are not told what further passed between the parties, save that Mr. Cruickshank wrote a letter addressed to himself which Mulla Ahmud signed and delivered to him there and then.

The title-deeds were not produced or re-deposited upon this occasion, but they are the title-deeds of the properties specified in the letter. The bank contends that whatever may have been the previous dealings between them and Mulla Ahmud, an equitable mortgage or lien upon these properties for a debt then due was created by this transaction of the 7th of June. For the appellant it is said that no new equitable mortgage or charge was thus created, but that a mere authority to sell was given with reference to properties, the title-deeds of which had been deposited under some previous and unproved contract.

I think that the bank is right in its contention, and that whatever the circumstances may have been under which the title-deeds were originally placed in the hands of the bank, an equitable mortgage or lien upon these properties to secure payment of the debt then actually due was created on the 7th June 1870. And I think this is so, even supposing it to be the case (which it is not shown to be) that the deposit was originally made under circumstances which made this transaction one which was *ultra vires* of the bank. For the decision of the Privy Council in the case of *The National Bank of Australasia* v. *Cherry* (1) already referred to, shows that the debt, as security for which the deposit was made, would remain and be enforceable against the debtor,

(1) 3 L. R., P. C., 299.

though the security might be worthless even as against the debtor, as being security which it was *ultra vires* of the bank to take; and that decision further shows that in such a case the debtor might subsequently, and in a manner so as not to be *ultra vires* of the bank (it having general power to take such securities for a debt actually due), make a fresh and valid agreement with the bank authorizing the bank to retain the deeds and promising that they should remain as a security for his debt.

It appears to me that under whatever circumstances the deeds were in the first instance deposited, a large debt was due from Mulla Ahmud on the 7th June 1869, and that he did then being pressed for payment, make a fresh arrangement, by which he gave an equitable mortgage, or lien, upon these properties, as a security for debt incurred previously; and that that fresh arrangement was binding upon him, and is binding as against the appellant who purchased with notice of the claim of the bank and can stand in no better position than Mulla Ahmud himself.

Something was said as to its being only a case of a general banker's lien. But it is not a case of general banker's lien at all. It is a specific appropriation of certain properties, the title-deeds of which are in the hands of the banker, as security for a specific debt which has been incurred, and is due and payable. It was also contended that the letter of the 7th June was inadmissible in evidence, because not stamped. But it has been repeatedly ruled in this Court,—*Mark Ridded Currie* v. *S. V. Mutu Ramen Chetty* (1); *Lalji Sing* v. *Syad Akram Ser* (2); *Srinath Saha* v. *Saroda Gobindo Chowdhry* (3), that the want of a proper stamp is not a ground for reversing the decision of the lower Court, when the receiving the document without a stamp does not affect the merits of the case or the jurisdiction of the Court. To the like effect is the decision of the N. W. P. High Court in *Crawley* v. *Maling* (4). The Madras High Court, I admit, has ruled differently in *Adinarayana Setti* v. *Minchin* (5): but I am bound to follow the rule adopted here. It is therefore unnecessary for me to express any opinion as to whether the document in question required any, and if any, what stamp.

(1) 3 B. L. R., A. C., 126.
(2) *Id.*, 235.
(3) 5 B. L. R., App., 10.
(4) 1 Agra H. C. Rep., 63.
(5) 3 Mad. H. C. Rep., 297

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Mr. Ingram, for the appellant, mentioned, but did not much rely upon the fact. that, on the 7th June 1869, the property was under attachment. But as that attachment was removed in September 1869, it left the plaintiff's security untouched—*Ananda Lal Das* v. *Radha Mohan Shaw* (1). The attachment under which the appellant claims was not made till the 5th of February 1870.

I think the judgment of the Recorder ought to be affirmed with costs. I may remark that it seems to me that (as was suggested by the Advocate-General) a decree for sale would have been the better decree to make under the circumstances.

On the 14th August 1871, the Advocate-General moved on notice to the appellant, that the decree made and signed in this appeal should be amended, and that the decree of the lower Court should be varied by ordering a sale instead of a foreclosure of the property mentioned in the plaint.

The appellant did not appear.

MACKPHERSON, J.—No cause is shown against the application; and I think that it ought to be granted, because, but for a misapprehension on my part, we should have originally drawn up our decree as the Advocate-General now asks that it may be drawn up.

As I have said in my judgment, it appears to me that a sale was the most natural relief to have granted. In the course of the hearing of the appeal, the Advocate-General stated that he had a ground of cross-appeal which he desirsd to raise under section 348 of Act VIII of 1859, adding that the plaintiff had originally sought a sale and not a foreclosure, If I had understood [as it appears that Mr. Justice Ainslie did] that the Advocate-General intended formally to ask us, and did in fact ask us, to decree a sale, I should certainly have so ordered it. As I now find that I misunderstood him, it was by a mistake on my part that the decree below was simply affirmed; therefore I think the decree should the now varied. and that a sale after three months should be decreed in lieu of foreclosure. It will be altered accordingly.

AINSLIE, J.—I concur in varying the decree as proposed.

Appeal dismissed.

(6) 2 B. L. R., F. B., 49.