Before Mr. Justice Phear.

DWARKANATH MITTER *v.* S. M. SARAT KUMARI DASI.

1871
May 2.

Registration—Inadmissibility of Unregistered Document in Evidence—Act XX of 1866, s. 49.

See also 11 B.L.R. 408

The defendant deposited certain title-deeds with the plaintiff as security for money due on a bond executed by the defendant in favor of the plaintiff. The deeds were sent with the following letter from the defendant to the plaintiff's attorneys :—"I have the pleasure of handing to you the title-deed of a house, 56, Lower Circular Road, as a collateral security for the Rs. 20, 000 which falls due this day. Please accept them from my manager." In a suit for an account of what was due to the plaintiff on the security of the deeds, *held*, that the letter needed registration, as being a document which created an interest in land, and therefore being unregistered was inadmissible in evidence.

THIS was a suit brought, among other things, for an account of what was due to the plaintiff as principal, interest, and costs on the security of certain title-deeds which had been deposited with him by the defendant. The defendant was the widow of Kali Prasanna Sing, who had been one of the defendants in the suit. It was stated in the plaint that Kali Prasanna Sing was indebted to the plaintiff in the sum of Rs. 12,400, under a specially registered bond, dated 30th January 1866, which bond was conditioned for the payment of Rs. 20,000 on 13th February 1866, and the residue by subsequent instalments ; that the bond contained an agreement that, in case of default in the payment of any or either of the instalments or any part thereof at the time stipulated, the plaintiff should be entitled to recover the whole of the principal sum and interest at 24 per cent. ; that the defendant was unable to pay the instalment of Rs. 20,000 which fell due on February 13th. 1866 ; and thereupon the plaintiff called on him to give security for the payment of the bond ; that, on 13th February 1866, Kali Prasanna Sing delivered to the plaintiff's manager, Khettranath Chatterjee, on behalf of and for the benefit of the plaintiff, the title-deeds of a house, 56, Lower Circular Road, belonging to the defendant,

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with the following letter from the defendant to the plaintiff's attorneys :—

"*13th February* 1866

Re Bond of D. N. Mitter.

MESSRS. BERNERS, SANDERSON, AND UPTON.

DEAR SIRS, —I have the pleasure of handing to you the title-deeds of a house, 56, Lower Circular Road, as a collateral security for the Rs. 20,000 (twenty thousand rupees) which falls due this day. Please accept them from my manager, and kindly enlighten me for its safe destination.

Yours faithfully,
KALI PRASANNA SING,"

The deeds and letter were delivered by Khettranath Chatterjee to the plaintiff's attorneys, with whom they were at the time of suit.

The *Advocate General* and Mr. *Marindin* for the plaintiff.

Mr. *Evans* and Mr. *Macrae* for the defndant.

The plaintiff at the hearing produced the letter of 13th February 1866, but an objection was taken that the document was unregistered.

The *Advocate General* contended that it was not an instrument which needed registration. It did not constitute the agreement to deposit; it merely stated the purpose for which the deeds were deposited.

Mr. *Evans, contra.*—The letter comes within section 49 of Act XX of 1866 as a document creating an interest in land. The letter authorizes the plaintiff to receive the deeds as a collateral security. If there had been no letter, there would have been nothing to show why the deeds were sent. Either it creates an interest in land, or it does not: if it does not, the plaintiff cannot recover in this suit, as he is suing on it; if it does, it needs registration.

The *Advocate General* in reply.—The equitable mortgage was complete on the deposit of the title-deeds. The letter is

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a mere statement of what had been done, and not an instrument creating an interest in land. There is a mortgage irrespective of the letter.

PHEAR, J.—It seems to me that Mr. Evans' contention must prevail. I cannot separate this letter from the transaction of the deposit of the title-deeds. It explains why the deeds are deposited, and states that the deposit is made as a collateral security for Rs. 20,000. This is not a case in which the charge on land is implied from the deposit of the deeds themselves, neither is it a case where the charge or the equitable mortgage is made expressly by parol. But it is, as I understand the plaint itself, a case where the basis of the plaintiff's claim is a written document signed by the owner of the property, and it appears to me that the document, and nothing else, creates the charge. It is therefore such a document as ought to be registered under the terms of the Registration Act, and cannot be admitted in evidence unless it is registered.

Suit dismissed.

Attorneys for the plaintiff: Messrs. *Berners & Co.*

Attorneys for the defendant: Messrs. *Carruthers* and *Dignam.*

Before Mr. Justice Norman, Officiating Chief Justice, and Mr. Justice Macpherson.

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April 28.

IN THE GOODS OF H. B. BERESFORD

AND

IN THE GOODS OF T. H. MADDOCK.

Court Fees Act (VII of 1870), *Sch. I, cls.* 11 *and* 12—*Trust Property.*

The term "property" in clauses 11 and 12 of schedule I of the Court Fees Act includes not only property to which the deceased was beneficially entitled during his life-time, but also all property which stood in his name as trustee, or of which he was possessed benami for others.

See also 14 B.L.R. 184

In the goods of George (1) distinguished.

THESE were two cases which had been referred to the Chief Justice, under section 5 of the Court Fees Act, by the Taxing Officer of the Court. The first case was stated as follows:—

(1) 6 B. L. R., App., 126.

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"On September 22nd, 1870, Mr. Samuel Cochrane (the manager of the Agra Bank), under a power from the executors in England of the will of Henry Brown Beresford, deceased, applied for and obtained from this Court letters of administration (with a copy of the will annexed) of the property and credits of the deceased. The petition for letters of administration contains the following statements:—'That there are assets belonging to the estate of the deceased within the jurisdiction of this Honorable Court to be administered; and that the amount of such assets likely to come to your petitioner's hands will not exceeded the sum of Rs. 24,000.'

"The *ad valorem* fee prescribed by the Court Fees Act, 1870, schedule I, clause 11, was, upon the facts stated in the petition, properly charged on the sum of Rs. 24,000, and was paid without any claim being made to exemption.

"Mr. Cochrane now applies that the fee so paid by him may be refunded, on the ground that the property in respect of which the fee was paid, belongs, not (as stated in the petition for letters of administration) to the estate of the deceased, but to a marriage settlement of which the deceased was the last of three trustees. The question to be considered is whether the *ad valorem* fee was payable in respect of property belonging (as it now appears) to a trust. This question may be determined under section 5 of the Court Fees Act, but there is no provision in the Act under which an order can be made by the High Court, or by any Judge or officer of the Court, for the refund of the *ad valorem* fee after it has been paid."

The Taxing Officer in making the reference referred to the case of *In the goods of George* (1).

The second case was stated as follows:—

"Andrew Ross Bell died in 1841, having first made his will, and thereby appointed Thomas Herbert Maddock (afterwards Sir Thomas Herbert Maddock) one of the executors. On 28th January 1842, Thomas Herbert Maddock alone proved the will in the late Supreme Court, and obtained probate. Thomas Herbert Maddock has since died in England, leaving no property of his own

(1) 6 B. L. R. App., 138.

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in this country, but leaving government securities for Rs. 21,600 standing in his name, but belonging to the estate of Andrew Ross Bell. The Administrator-General has obtained from this Court letters of administration (with a copy of the will annexed) of the unadministered property and credits of Andrew Ross Bell, and has also obtained letters of administration of the property and credits of Thomas Herbert Maddock; the latter for the sole purpose of effecting the transfer of the government securities for Rs. 21,600 to himself as administrator of the estate of Andrew Ross Bell, and the former for the purpose of administering the government securities after such transfer. The government securities admittedly belong to the estate of Andrew Ross Bell, and it is only because they stand in the name of Thomas Herbert Maddock that it has been necessary to obtain letters of administration to his estate. The question referred for the determination of the Chief Justice is, whether, under the Court Fees Act, 1870, schedule I., clause 11, the *ad valorem* stamp fee is payable in respect of each of the letters of administration obtained by the Administrator-General. The decision of the question in *In the goods of H. B. Beresford* will probably govern the question in the present case."

The Chief Justice (*offg.*) passed the following order:—

"This is not at present a question as to the necessity of paying a fee; but it is a question whether a certain fee should be refunded on discovering that it has been paid under a mistake. It involves a point of so much importance on the construction of clauses 11 and 12 of schedule I. of the Court Fees Act, that I think a communication should be made to the Government, and the papers submitted to the Advocate-General, in order that it may be considered and argued, if thought necessary, by counsel, whether duty is not chargeable on property held in trust or benami on the death of the person holding such property where probate or a certificate becomes necessary to perfect the transfer of such property. The exception in 55 Geo. III., c. 184, is not found in the Indian Act."

The suggestions in the order were acted on, and the cases were thereupon set down to be heard and argued.

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Mr. *Marindin* for the petitioner in the first case.

The *Administrator-General* in person in the second case.

Mr. *Marindin*.—Clause 11 of the schedule to Act VII of 1870 does not apply to any cases except where the party, in respect of whose property duty is to be paid, has a beneficial interest in the property. It does not apply to trust property. The corresponding Act in England, 55 Geo. III., c. 184, makes by section 38 a special exemption of trust property from payment of duty. It has been held here, by Couch, C. J., in *In the goods of George* (1), that such property is not liable to duty. [NORMAN, J.—In that case there was a mere power; the property had already vested.] There Couch, C.J., reads the word "property" as meaning property of the deceased. Is this property of the deceased? It is submitted it is not, within the meaning of clause 11. The enjoyment of this property is in no way affected by the death of the testator. There is considerable hardship in making duty payable on property merely on the death of the trustee. The beneficial ownership was not in him; he could not deal with the property except for the purposes of the trust. It is not therefore property of his within the meaning of the Court Fees Act. The decision of Couch, C.J., in *In the goods of George* (1), governs this case: the only difference is that there the property was not vested in the deceased; the probate was required before the power could be acted on.

The *Administrator-General* appeared in person, and contended that the word "property" in clause 11 of the schedule to the Court Fees Act, should be taken in connection with The Indian Succession Act X of 1865, and The Administrator-General's Act XXIV of 1867, and Act XXVII of 1860. See sections 280—283 of Act X of 1865. Under section 283, this property would not be liable for the debts of Maddock; "assets" would not include such property. The three Acts make one system.

(1) 6 B. L. R. App., 138.

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Mr. *Wilkinson* (the *Advocate-General* with him) appeared for the Government.

NORMAN, J.—Your contention is that, under section 11 of the schedule to the Court Fees Act, the word "property" includes trust property.

Mr. *Wilkinson*.—Yes.

NORMAN, J.—The 11th clause of schedule I. of the Court Fees Act of 1870 provides for the fee which is to be payable on the probate of a will or letters of administration, with or without the will annexed. The 12th clause provides for the fee payable upon a certificate granted under Act XXVII of 1860 (for facilitating the collections of debts on successions for the security of parties paying debts to the representatives of deceased persons). The fee is thereby fixed at 2 per cent. on the amount or value of the property in respect of which the probate, or letters, or certificates shall be granted, if such amount exceeds the sum of Rs. 1,000. The Court Fees Act contains no such exception of trust properties as is to be found in the 58th section of the English Stamp Act, 55 Geo. III., c. 184. I am of opinion that the term "property" as mentioned in those clauses, includes not only property to which the deceased was beneficially entitled during his life-time, but also all property which stood in his name as trustee, or of which he was possessed benami for others.

The language of the clause, so far as it relates to the amount payable upon property in respect of which probate is to be granted, appears clear; but the meaning becomes still more clear when the note at the foot of those clauses is looked to, which is as follows:—"The person to whom any such certificate is granted, or his representative, shall after the expiration of twelve months from the date of such certificate, and thereafter whenever the Court granting such certificate, requires him so to do, file a statement on oath of all moneys recovered or realized by him under such certificate. If the moneys so recovered or realized exceed the amount of debts or other property as sworn to by the person to whom the certificate is granted, the Court

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may cancel the same, and order such person to take out a fresh certicate and pay the fee prescribed by this schedule for such excess."

Now, on reading that note, it appears that, in order to avoid any mistake, the Act expressly says that if the amount recovered or realized under the certificate exceeds the amount of debts or other property as sworn to, a fee is to be payable for the excess. The fee, therefore, on the certificate is payable on the total amount of the money recovered or realized, without any reference whatever to the amount of the beneficial interest to be disposed of by the person obtaining the certificate. If the money realized, or, in other words, the debts collected, under the certificate amounted to Rs. 20,000, and the liabilities of the testator were Rs. 19,000, the fee would be payable by the person obtaining the certificate upon the entire amount collected, and not upon the surplus assets available to or distributable by him. It is clear, therefore, that the value of the property alluded to in the 11th and 12th clauses does not mean the beneficial interest of the testator in such property. For these reasons I am of opinion that the full *ad valorem* duty is payable in the case both of Mr. Beresford and Sir Herbert Maddock.

The decision of Chief Justice Sir Richard Couch in *In the Goods of George* (1) appears to me not to be in any way touched by anything which we have said to-day. There probate there was granted in respect of a will made in execution of a naked power of appointment amongst particular persons, which was not, either in the hands of the testator or of the executor, property of any description.

MACPHERSON, J.—I am entirely of the same opinion, and think that there is nothing whatever in the Court Fees Act to show that there was any intention to exempt trust property from the operation of schedule I., clause 11. Trust property was expressly exempted by the English Stamp Act; and if the Legislature had intended that it should not be chargeable in this country, there would, doubtless, have been an express exemption to that effect in the Court Fees Act. There is no such exemption, and the language used clearly includes trust property.

(1) 6 B. L. R., App., 138.