

1897 to this view ; but having regard to the facts of those cases we do
 SHAMA not think that those observations militate against the opinion
 CHARAN which we have formed in this case.
 CHAKRA- As regards Tarak Nath Ghose no such question of jurisdic-
 VARTI tion arises.
 v. Upon these grounds we are of opinion that this rule should
 KATU be discharged.
 MUNDAL. C. E. G. *Rule discharged.*

ORIGINAL CIVIL.

Before Mr. Justice Jenkins.

SRINATH ROY *v.* GODADHUR DAS. *

1897
 February 24. *Deposit of Title-deeds—Transfer of Property Act (IV of 1882), section 59—
 Equitable mortgage—Immoveable properties situated partly outside the
 limits of Calcutta—Transaction in Calcutta—Decree for sale—Form of
 decrees—Practice.*

The defendant borrowed money from the plaintiff in Calcutta by deposit of title deeds relating to immoveable properties situated partly inside and partly outside the limits of the town of Calcutta. In a suit by the plaintiff it was held that the transaction having taken place in Calcutta the mortgage was valid as an equitable mortgage under section 59 of the Transfer of Property Act, though some of the properties were situated outside the limits of the town, and that according to the practice of the Court the appropriate remedy in such a mortgage suit is a decree for sale.

THE facts of the case are these : One Godadhur Das borrowed a sum of Rs. 35,000 from Rajah Srinath Roy, and deposited with him in Calcutta the title deeds of premises No. 306, Upper Chitpore Road, No. 7, Shampookar Street, and No. 138, Baliaghata Street, and executed the following memorandum which was registered : " Having this day borrowed from you Rs. 35,000 I do hereby deposit with you the title deeds as collateral security for the repayment of the said sum." Of the abovenamed properties the first two are situate within and the third outside the town of Calcutta. On default by the defendant in repayment of the loan, the plaintiff having obtained leave under clause 12 of the Charter brought the present suit for recovery of his claim by sale of the properties mortgaged.

* Original Civil Suit No. 91 of 1896.

At the hearing two questions arose : *first*—whether an equitable mortgage could be created with respect to properties situated outside the town of Calcutta ; and, *secondly*, whether the mortgagee was entitled to a decree for sale.

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Mr. *Sen Gupta* and Mr. *C. R. Das* for the plaintiff.

No one appeared for the defendant.

Mr. *Sen Gupta*.—The mortgage is valid under section 59, paragraph 3 of the Transfer of Property Act (IV of 1882). That section lays down no restriction as to the situation of the property. All that is necessary to the validity of a mortgage contemplated under section 59 of the Transfer of Property Act is that the deposit of title deeds should be made within the towns mentioned in that section. See *Madho Das v. Ramkissen* (1), *Manekji v. Rustomji Naserwanji Mistry* (2). Besides, the plaintiff in this case has obtained leave under clause 12 of the Charter. As regards the second question as to whether the mortgagee was entitled to a decree for sale. In England an equitable mortgagee by deposit of title deeds, whether such a deposit was accompanied by a memorandum in writing or not, was entitled only to foreclosure and not to sale. See *James v. James* (3). But now however, under the conveyancing Act of 1881, 44 and 45 Vict., c. 41, section 25, an equitable mortgagee may obtain a decree for sale in lieu of foreclosure. If the mortgage in the present case is valid under section 59 of the Transfer of Property Act (IV of 1882) the mortgagee is entitled to the same rights as an ordinary mortgagee under section 67 of that Act.

JENKINS, J.—In this case the documents of title relating to the immoveable property mentioned in the plaint were delivered with intent to create as security thereon, and as the transaction took place in the town of Calcutta I am of opinion that a good mortgage was thereby created, though some of the properties are situate outside the limits of the town. The only question is as to the appropriate remedy. I was referred to the statement in a text book that the practice in mortgages of this class is regulated by the English practice, and if that statement

(1) I. L. R., 14 Calc., 238.

(2) I. L. R., 14 Bom., 269.

(3) I. R., 16 Eq., 153.

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were correct then the remedy would be foreclosure. It seems, however, that the practice in this Court has for a long series of years been to decree a sale, and I accordingly will make a decree in that form. I think it would be right to preface the decree with a statement to the following effect: "It appearing that the documents of title relating to the immoveable properties in question and mentioned in the plaint have been delivered to the plaintiff or his agent with intent to create security thereon. Declare, &c."

By this means it will appear on the face of the decree that the case comes within the last paragraph of section 59 of the Transfer of Property Act.

Attorney for the plaintiff: Babu Ashutosh Dhur.

S. C. B.

FULL BENCH.

Before Sir W. Comer Petheram, Knight, Chief Justice, Mr. Justice O'Keenaly, Mr. Justice Macpherson, Mr. Justice Trevelyan and Mr. Justice Banerjee.

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 September 4.

FATIMUNNISSA alias KANEZ FATIMA AND OTHERS (PETITIONERS) v. DEOKI PERSHAD AND OTHERS (OPPOSITE PARTY).^a

Review—Appeal—Appeal from original decree—High Court Rules, Part II, Chapter VIII, Rule 17—Deposit of cost for paper book—Order of Dismissal for default—Procedure to set aside such order—Civil Procedure Code (1852), sections 623, 626.

A decree of a Division Bench of the High Court, dismissing an appeal for default in depositing the estimated costs of preparation of the paper book under Rule 17 of the High Court Rules, Part II, Chapter VIII, can only be set aside by an order under section 626 of the Civil Procedure Code (Act XIV of 1852).

Ramhari Sahu v. Madan Mohan Mitter (1), so far as it decides the contrary, is wrongly decided.

The question referred to the Full Bench in this case arose in a rule upon the application of the petitioners for restoration of an appeal from an original decree, which was dismissed for default

^a Full Bench Reference on Rule Nisi No. 333 of 1896 issued in Appeal from Original Decree No. 215 of 1894, being an appeal against the decree of the Court of the Second Subordinate Judge of Saran passed in suit No. 15 of 1892, and dated the 28th March 1894.