

APPELLATE CIVIL.

Before Mr. Justice Doss and Mr. Justice Richardson.

GOLAM MOHIUDDIN HOSSEIN

v.

PARBATI.*

1909
March 27.

Hât—Mortgage—Whether the rents and profits of hât could be mortgaged—Transfer of Property Act (IV of 1882), s. 58—General Clauses Act (I of 1868), s. 2, cl. (5).

The rents and profits derivable from a *hât* can be validly mortgaged.

Surendro Prosad Bhattacharji v. Kedar Nath Bhattacharji (1), *Bangshodhar Biswas v. Mudhoo Meladdar* (2), *Surendra Narain Singh v. Bhai Lal Thakur* (3) and *Sikandar v. Bahadur* (4) referred to.

APPEAL by the defendants, Syed Golam Mohiuddin Hossein and others.

This appeal arose out of an action brought by the plaintiff to recover possession of a *hât* called Alamdangâ *hât*.

The plaintiff's allegation was, that on the 19th November 1898, one Syed Ashgar Reza executed a registered mortgage bond in favor of Ram Chandra Babu, whereby amongst other properties this *hât*, which formerly lay in Alamgunge but located within the compound walls of a certain Imambara, was also mortgaged. Ram Chandra Babu brought a suit upon his mortgage bond against the mortgagor and obtained a decree on the 30th March 1904 directing the sale of the mortgaged properties. In execution of that decree the plaintiff, Musammat Parbati, purchased the said *hât*, on the 7th June 1905, which was described as *hât* Alamgunge situated within the compound walls of the Imambara. On the 15th September 1905, the plaintiff obtained possession of the *hât* from the Court.

* Appeal from Original Decree, No. 241 of 1907, against the decree of Surya Narain Das, Subordinate Judge of Purneah, dated March 27, 1907.

(1) (1891) I. L. R. 19 Calc. 8.

(3) (1895) I. L. R. 22 Calc. 752.

(2) (1874) 21 W. R., 383.

(4) (1905) I. L. R. 27 All. 46.

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The defendants, on the 9th January 1906, in execution of a certificate issued, after the mortgage suit, by the Collector under the Public Demands Recovery Act against the said Syed Ashgar Reza, purchased his *pucca* and *kacha* dwelling house with its materials and furniture together with certain lands including the land whereon the said dwelling house was erected, and in March 1906 obtained possession of these properties.

The plaintiff stated that although the Imambara and the *hât* held within its compound, were not included in the certificate sale of the Collector, yet the defendants under the colour of their purchase dispossessed her in April 1906, and hence the suit.

The defendants pleaded, *inter alia*, that the mortgage deed did not cover the land of the Imambara on which the *hât* was held; that they having purchased the land of the Imambara were entitled to claim the said *hât* as benefit arising out of land.

The Court of first instance overruled the objections of the defendants, and decreed the plaintiff's suit.

Against this decision the defendants appealed to the High Court.

Moulvi Shamsul Huda (Babu Hemendra Nath Sen and Babu Jnan Ranjan Chatterjee with him), for the appellants. The mortgage is not a valid one, as it is not of any specific immoveable property. In the deed the boundaries of the *hât* are given as it existed at Alamgunge. At the time of mortgage the *hât* was being held upon the land in dispute. There can be no roving mortgage attaching on one property at one time and on another property at another time. The identity of the Alamgunge *hât* is destroyed as soon as it shifted from one place to another. The land would no longer be the same, nor the shops, nor the articles sold. The mere name cannot establish the identity.

Babu Nalini Ranjan Chatterjee (Moulvi Mahomed Tahir with him), for the respondent. The mortgage of a *hât* is valid in law. It is a transfer of rents and profits arising out of the land. The *hât* is specific in the deed. Having regard to the terms of the deed the identity of the *hât* is established:

Surendra Narain Singh v. Bhai Lal Thakur (1), *Sikandar v. Bahadur* (2), *Bungshodhur Biswas v. Mudhoo Mohuldar* (3) and *Surendro Prosad Bhattacharji v. Kedar Nath Bhattacharji* (4); see also Jones' Treatise on the Law of Mortgages, 6th Edition, section 140.

Moulvi Shamsul Huda, in reply.

Cur. adv. vult.

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Doss J. This appeal arises out of an action to recover possession of a certain *hât* called Alamungee *hât*.

On the 19th November 1898, corresponding to the 4th Aghran 1306, one Syed Ashgar Reza executed a mortgage bond in favour of Ram Chandra Babu whereby amongst other properties he mortgaged the *hât* in suit. On the 30th March 1904, the mortgagee obtained a mortgage decree directing the sale of the mortgaged properties. On the 7th June 1905, the *hât* was sold and purchased by the plaintiff for Rs. 16,000. She duly obtained possession of this *hât* on the 15th September 1905. Subsequently on the 9th January 1906, the dwelling house of Syed Ashgar Reza, together with the adjoining site on which the *hât* is held, was sold under a certificate issued under the Public Demands Recovery Act and was purchased by the defendants. In March 1906, the defendants obtained possession of the properties purchased by them and thereafter dispossessed the plaintiff from this *hât*. In the month following, the plaintiff brought the present action for possession of the *hât*.

The defendants alleged that under their purchase they were entitled not only to the site but also to the *hât* which was held upon it.

The learned Subordinate Judge has, upon the facts which are practically admitted, given the plaintiff a decree.

The first question which arises in this appeal is whether a *hât* can be the subject of a valid mortgage.

What the mortgagor really transfers, are the rents and profits issuing out of the land, or, in the words of the General

(1) (1895) I. L. R. 22 Calc. 752.

(3) (1874) 21 W. R. 383.

(2) (1905) I. L. R. 27 All. 462.

(4) (1891) I. L. R. 19 Calc. 8.

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Clauses Act used in the definition of “immoveable property,” “benefits arising out of land.” There is no express authority upon this point, but the principle upon which depends the solution of this question is well-settled. There can be no doubt that everything which is capable of being transferred may form the subject of a valid mortgage. Story in his Equity Jurisprudence in section 1021, says: “As to the kinds of property which may be mortgaged, it may be stated that, in equity, whatever property, personal or real, is capable of an absolute sale, may be the subject of a mortgage Therefore rights in remainder and reversion, possibilities coupled with an interest, rents, franchises and choses in action are capable of being mortgaged.” See also Jones on Mortgage, 6th Edition, section 140.

It is, therefore, clear that rents and profits may be transferred by way of mortgage apart from the land itself.

If any further authority is needed in support of this proposition, it is to be found in the observations of the learned Judges of this Court in *Surendro Prasad Bhattacharji v. Kedar Nath Bhattacharji* (1). There the question was whether the *sayer* compensation paid by Government for the abolition of a *hât*, which existed prior to the decennial settlement, was capable of being mortgaged. It was held that such compensation did not partake of the nature of *malikana*, or could not in any sense be regarded as rent or profits of the land and that, therefore, it could not be mortgaged. The learned Judges distinguished the *sayer* compensation, from rent or profits of land. They thus observed:—

“These duties, that is, the duties of which the *sayer* compensation was an instance, it will be observed, were in no sense rent or profits which the owner of a *hât* or bazar was entitled to receive for the use of land or for houses, shops or other buildings erected thereupon” clearly indicating thereby that the rents or profits receivable by the owner of a *hât* or bazar for the use of land or for houses or shops erected on it, can form the subject of a valid mortgage.

(1) (1891) I. L. R. 19 Calc. 8.

In *Bungshodhur Biswas v. Mudhoo Mohuddar* (1), the question was whether a lease could be given of the profits of a *hât*. The learned Judges said : “ The collections which the plaintiff let in farm to the defendants are not, it seems to us, in the nature of internal duties. They are merely in the nature of rent which the owner of the land receives from persons who go to sell goods on his land in the shape of a part of the proceeds of sale, instead of a fixed monthly or yearly payment.” If the rents or profits of a *hât* can form the subject of a valid lease, there is no reason why a mortgage of such rents or profits cannot be given.

In *Surendra Narain Singh v. Bhai Lal Thakur* (2), the validity of a lease of a *hât* was assumed and the question was whether registration of such a lease was compulsory. It was held that a *hât* was a benefit arising out of land and, therefore, within the definition of immovable property as given in section 2, clause 5 of the General Clauses Act (I of 1868).

Similarly in the case of *Sikandar v. Bahadur* (3), the validity of a lease of the right to collect market dues was assumed and it was held that such market dues were in the nature of benefits arising out of land and, therefore, registration of the lease was necessary.

These authorities are, in my opinion, sufficient to establish the proposition that the rents and profits derivable from a *hât* can be validly mortgaged.

But it was contended further on behalf of the appellant, that the nature of the *hât* is so peculiar that the mortgage of it cannot be valid according to law.

In the mortgage bond the description of the *hât* is as follows :—“ And the said *hât* called Alamgunge used formerly to be held in Alamgunge and it has now been removed by me from there and established in the compound wherein my *masjid*, &c., stand and it is my intention to remove this *hât* from that compound and establish it elsewhere ; so I do hereby also mortgage and pledge 16 annas of the said *hât* Alamgunge and the

(1) (1874) 21 W. R. 383.

(2) (1895) I. L. R. 22 Calc. 752.

(3) (1905) I. L. R. 27 All. 462.

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mortgage under this bond will hold good in respect of the *hât* called Alamgunge under any circumstance and every place whether it be in that compound where it is now held or any other place where it may be established and the said *hât* will be sold by auction without any objection on the ground that the site of the *hât* has been changed. Although the boundaries of the said *hât* which have been fixed from formerly within Alamgunge, are herein given still as set forth above, the boundaries of the said *hât* shall be considered to be of the place where it may be held and in case of its being sold by auction, it shall be sold with those boundaries."

It is clear from these words that the mortgage was of *hât* Alamgunge held on the site where it was held at the time of the mortgage, with a further covenant that the mortgagee should have the same right over the *hât* on whatever site it might thereafter be held, that is, even if it were removed to some other site situated on the property of the mortgagor. Whether this further covenant is valid or not, as between the mortgagor and the mortgagee or between the purchaser of the rights and interests of the mortgagor at an execution sale and the mortgagee, it is unnecessary to consider; because the *hât* is still being held on the site where it used to be held at the time of the mortgage. There can be no doubt that the mortgage of the *hât* now held on the same site where it used to be held at the time of the mortgage and at the time of the sale is separable from the further covenant to which I have just referred and is valid in law.

It follows, therefore, that the purchase of the defendant is subject to the purchase by the plaintiff at the sale in execution of the mortgage in favour of Ram Chandra Babu, and the plaintiff is entitled to have possession of the *hât*.

For these reasons, the judgment of the Court below is affirmed and this appeal is dismissed with costs.

RICHARDSON J. I agree.

Appeal dismissed.