

## APPEAL FROM ORIGINAL CIVIL.

*Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, Mr. Justice Harington and Mr. Justice Fletcher.*

INDRA BIBI

1907

u Nov. 3.

JAIN SIRDAR AHIRI.\*

*Power-of-attorney—Charge on immoveable property—Registration Act (III of 1877) ss. 17, 21, 49, 80—Non-compliance with provisions of Registration Act.*

Where a power-of-attorney purporting to create a charge on immoveable property did not sufficiently describe the property, and was stamped and registered as a power-of-attorney, and entered in Book IV (the Miscellaneous Register).—

*Held*, that the document was not registered in accordance with the provisions of the Registration Act, and, therefore could not, under section 49 of the Act, affect any immoveable property comprised therein.

*Najibulla Mulla v. Nasir Mistri*(1) referred to.

APPEAL by the plaintiff Sreemutty Indra Bibi, against the judgment of Chitty J.

This was a suit brought by the plaintiff, Sreemutty Indra Bibi, to have it declared that a power-of-attorney executed and registered by the defendant Jain Sirdar Ahiri, as administrator to the estate of Sitab Chand Ahiri, deceased, in favour of the plaintiff's husband, created a charge on the properties belonging to the estate for securing the money lent by the plaintiff's husband, to the deceased Sitab Chand Ahiri.

One Kissen Misser, a Hindu inhabitant of Calcutta, governed by the Mitakshara School of Hindu Law, died at Calcutta on the 8th July 1887, leaving a will, whereby he bequeathed all his properties to one Sitab Chand Ahiri and his heirs absolutely, subject to certain trusts. After the will was proved Sitab Chand Ahiri, on the 14th October 1891, died intestate, leaving him surviving his widow, Moona Bibi, and two infant

\* Appeal from Original Civil No. 31 of 1907.

(1) (1891) I. L. R. 7 Cal. 196.

daughters. Thereafter Moona Bibi took out letters of administration to the estate of her deceased husband.

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In March 1896 Moona Bibi died, leaving her surviving an infant daughter Dhunwa Bibi, and her father, the defendant, Jain Sirdar Ahiri. Jain Sirdar applied for letters of administration *de bonis non*, to the estate of his son-in-law Sitab Chand, but caveats were entered by Roshun Lal Khettry as executor and creditor of Kissen Misser.

Thereafter the defendant Jain Sirdar, being unable to meet the expenses necessary for the maintenance of Dhunwa Bibi and for administering the estate of Sitab Chand, obtained loans from time to time from Bisseswar Das Pagulia, the plaintiff's husband. Subsequently the caveats entered by Roshun Lal Khettry were discharged and letters of administration granted to Sitab Chand and the defendant Jain Sirdar, on the 7th September 1897. The defendant Jain Sirdar being unable to pay the sums borrowed from Bisesswar Das Pagulia, executed on the 5th August 1898, a power-of-attorney to secure the debts due by him. On the 12th April 1903, Bisseswar Das Pagulia died, leaving him surviving the plaintiff, Sreemutty Indra Bibi, his sole widow, and he left a will, which however was not proved. On the 13th February 1904, the plaintiff, Sreemutty Indra Bibi, applied for letters of administration, which she obtained on the 31st August 1904. Jain Sirdar in his defence alleged that the plaint disclosed no cause of action, that the power did not operate to create any charge on the properties belonging to the estate of Sitab Chand, and further that the suit was barred by limitation.

The case came up for trial before Chitty J., who on the 19th February 1907, ordered that the minor Dhunwa Bibi should be added a party defendant and that, if she did not appear, the case would be re-argued. Dhunwa Bibi was added a party defendant and upon the case coming up again for trial Chitty J. delivered on the 20th May 1907, the following judgment :—

CHITTY J. In this suit by my judgment, dated 19th February 1907, I directed that Dhunwa Bibi the sole beneficiary of the estate of Sitab Chand Ahiri should be made a party before I could determine whether the power of attorney dated 5th August 1898 in the plaint mentioned did in fact create a charge in favour of the plaintiff on the said estate and, if so, to what extent. That judgment should be read as part of this judgment. Dhunwa Bibi has now been

added as a party defendant and the matter has been more fully argued before me. The only question to be decided at the present stage is whether, as claimed in paragraph 11 of the plaint, this power of attorney constitutes a charge upon the estate, which this Court can enforce. There is no doubt that in England powers of attorney of a similar character have been held to constitute an equitable mortgage, see *Bennett v. Cooper*, (1). *In re Parkinson* (2) and *Abbott v. Stratten* (3). In India however the question is subject to different considerations. In the first place it is not so easy to draw the line of distinction between a mortgage and a charge, secondly we are here confronted with the provisions of the Stamp and Registration Acts, which have to be strictly observed. Now in this case it is not suggested that there was any other contract between Jain Sardar Ahiri and Biseswar Lal Pagulia than that contained in this power of attorney. If a charge was created it was created by that document alone. I will assume for the moment that that document did not amount to a mortgage as defined by section 58 of the Transfer of Property Act, but merely operated to create a charge in favour of Biseswar Lal Pagulia. It would nevertheless come within the definition of a mortgage deed as given in the Stamp Act (I of 1879) (the Act governing this case), and would therefore require a stamp of Rs. 50. It would also require registration under section 17 of the Registration Act, as purporting or operating to create, declare or assign a right, title or interest in immoveable property of the value of more than Rs. 100. The document was no doubt stamped and registered in Book IV as a power of attorney, but it was neither sufficiently stamped nor was it registered in accordance with the provisions of the Registration Act as a document affecting immoveable property. It did not contain a description of the property said to be affected sufficient to identify the same (section 21), nor was it entered in Book I (section 51). Having regard to these facts I can only conclude, either that the parties did not intend that the document should operate as a charge, or that, so intending, they did not take the proper and necessary steps to give effect to that intention. The provisions of the Registration Act are inoperative and the intention of the Legislature must have been that no document not properly registered should directly or indirectly operate to create an interest in immoveable property. Section 49 prohibits the receipt of such a document as evidence of any transaction affecting the property. *Bengal Banking Corporation Limited v. Mackertich* (4). For these reasons I am of opinion that this power of attorney cannot be received as evidence of the charge, and as no other evidence is admissible, the plaintiff's suit must fail. It is therefore unnecessary for me to go further into the case.

The suit is dismissed with costs including reserved costs.

From this judgment the plaintiff appealed.

*The Standing Counsel, (Mr. S. P. Sinha) (with him Mr. B. B. Acharjee), for the appellant. The question to be decided here is whether a power given to realize rents and profits amounts to a*

(1) 1845) 9 Beav. 252, 258.

(3) 1849) 3 J. and La. T. 603.

(2) (1863) 13 L. T. R. (N. S.) 26.

(4) (1884) I. L. R. 10 Calc. 315.

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charge or not. The following cases show that a document of this nature does operate as a charge. *Bennett v. Cooper*(1), *Abbott v. Stratten*(2). *In re Parkinson's Estate*(3). If there is a question of insufficiency of stamp that can be treated as in the nature of a penalty. As to the question of registration, section 17 of the Registration Act deals with documents, of which registration is compulsory. A document creating a charge would be copied into Book I. The document in this case has been copied into Book IV instead. The Superior Officer under section 69 of the Registration Act has power to correct any errors that may arise. *Desai's Registration Act*, page 111, and *Ghose's Law of Mortgages*, 3rd edition, page 230; *Najibulla Mulla v. Nusir Mistri*(4) distinguished. The intention of the parties from the word used in the instrument was to create a charge, and as long as it was registered, the fact that it was copied into Book IV, instead of Book I, would not affect the validity of the registration.

*Mr. A. Chowdhuri*, and *Mr. Mehta* for the 2nd respondents. This document does not operate as an equitable mortgage of these properties. [Here Counsel was stopped by the Court.]

*Mr. A. N. Chowdhuri*, for the 1st respondents, was not called upon.

MACLEAN C. J. The only question we have to decide upon this appeal is whether the power-of-attorney of the 5th of August 1898, created a charge on the properties generally referred to in it, securing to the applicant's husband, whose representative she now is, certain moneys, which she says were advanced for the purposes of the estate. I am doubtful, looking into the language of the document, whether it constitutes an equitable charge, seeing that any money to be received by the attorney, in whose favour the power was given, was to be paid, not to himself, but into the Bank, not in his own name, but in the name of the person giving the power.

I will, however, assume in favour of the appellant that the document did constitute an equitable charge in favour of the

(1) (1845) 9 Beav. 252, 258.

(3) (1865) 13 L. T. R. (N. S.) 26.

(2) (1846) 3 J. and La. T. 603, 612, 614.

(4) (1881) 1. L. R. 7 Calc. 196.

person, to whom the power was given, but even then, the want of registration in compliance with the provisions of the Registration Act is fatal to the plaintiff's case.

It is quite clear under section 17 of that Act, that if the document was one, which purported to affect, or to create any interest in, immoveable property, it was bound to be registered. Section 49 says that "No document required by section 17 to be registered shall affect any immoveable property comprised therein, \* \* \* unless it has been registered in accordance with the provisions of this Act."

When we look into the circumstances of this case it appears that the document in question has not been registered in compliance with the provisions of the Act. It was admittedly stamped only with the stamp required for a power-of-attorney and not for a document creating an equitable charge, and it was apparently so presented to the Registering Officer. If it was an equitable charge, it is quite clear that it ought to have been entered in Book I, and certain particulars, which are compulsorily required by section 21 of the Act relating to immoveable property, ought to have been furnished. Section 21 says that: "No non-testamentary document relating to immoveable property shall be accepted for registration, unless it contains a description of such property sufficient to identify the same." That was not the case here—there was no such description—and in point of fact the document was entered, not in Book I, which is a register of non-testamentary documents relating to immoveable property, but was entered in Book IV, which is a "Miscellaneous Register." The case of *Najibulla Mulla v. Nusir Mistri* (1) is akin to the present. But, to my mind, it is sufficient to say that the document was not registered in accordance with the provisions of the Act and, therefore, under section 49, it could not affect any immoveable property comprised therein.

I, therefore, think that the view taken by Mr. Justice Chitty is quite correct and this appeal must be dismissed with costs.

HARRINGTON J. I agree. I will only add the observation that the fact that the parties accepted the document with an

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endorsement showing that it had not been registered in Book I, and the fact that no leave was obtained under section 90 of the Probate and Administration Act has led me to the conclusion that the parties did not intend to create a charge by the document, which was executed. For these reasons, I think the appeal should be dismissed.

FLETCHER J. I also agree.

Attorney for the appellant : *G. K. Ghose.*

Attorneys for the respondents : *Bonnerjee and Haldar and M. K. Bose.*

*Appeal dismissed.*

R. G. M.