

APPELLATE CIVIL.

Before Mr. Justice Rampini and Mr. Justice Bodilly.

HARENDRA LAL ROY CHOWDHRY

v.

TARINI CHARAN CHAKRAVARTI.*

1904

June 10.

Indian Stamp Act (I of 1879) s. 26—Act XXXVI of 1860, s. 14—Meaning of word—“claimable”—Mortgage to secure future advances.

The word *claimable* in sec. 26 of Act I of 1879 means “*claimable in a Court of Justice.*”

A mortgage bond, intended to secure future advances up to the sum of Rs. 10,000 at a time, was executed on a stamp-paper of Rs. 50, and under it altogether more than Rs. 10,000 was privately realised by the mortgagee on different occasions.

Held, that there was nothing in sec. 26 of the Stamp Act of 1879 to prevent the mortgagee from suing to recover the balance of the debt due on the mortgage.

APPEAL by the plaintiff, Harendra Lal Roy Chowdhry.

The defendants Nos. 1 and 2, Tarini Charan Chakravarti and another, and Durga Charan Chakravarti, father of the defendant No. 3, executed on the 14th July 1892 a mortgage bond in favor of the plaintiff, mortgaging some properties, to secure future advances to be made to them for conducting a joint business, up to the sum of Rs. 10,000 at a time. The sums borrowed from time to time were to be entered in a *hatchitta* and to carry interest at 12 per cent. per annum, compound interest being charged, if the sums were not repaid within the year. The bond was engrossed on a stamp-paper of Rs. 50. Another bond was executed by the same parties on the 20th August 1895, mortgaging certain other properties for the debt secured by the first bond.

The present suit was instituted by the plaintiff for the recovery of Rs. 13,977-5 annas due under the bond. The account annexed

* Appeal from Original Decree No. 211 of 1902 against the decree of Prassanno Kumar Bose, Subordinate Judge of Barisal, dated the 12th March 1902.

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to the plaint showed that sums were borrowed and repaid from time to time from the 10th August 1892 to the 5th March 1900, and that the total of the sums repaid considerably exceeded Rs. 10,000.

The principal defence of the defendants was that, inasmuch as a sum of money, which could be borrowed on a stamp of Rs. 50, had been already paid off, the plaintiff could not recover anything in excess of such amount on the basis of the bonds, and that the bonds were not operative in respect of any money received in excess of Rs. 10,000. The defendants Nos. 2 and 3 made also some special pleas in defence regarding their own liability, &c Limitation was also pleaded.

The Subordinate Judge held that in the circumstances the plaintiff was not entitled to claim any sum on the basis of the mortgage bond and dismissed the suit. Reading and comparing sec. 26 of the Stamp Act, I of 1879 with sec. 14 of the old Stamp Act XXXVI of 1860, he held that the plaintiff could not claim more than the sum, for which the stamp duty was paid, *i.e.*, Rs. 10,000, as principal, that under the bond he could claim that sum once only, either by private realisation or through the Court, and as it was admitted in the plaint that more than Rs. 10,000 had been privately realised by the plaintiff as principal before fresh advances were made, the suit was not maintainable.

Mr. Hill (Babu Lal Mohan Das and Babu Bidhu Bhushan Ganguli with him), for the appellant, contended that the word 'claimable' in sec. 26 of Act I of 1879 meant 'claimable in a Court of Justice.' Under the terms of the bond, the mortgagors agreed that the properties mortgaged should form a standing security for the balance due on a running account not exceeding Rs. 10,000. It was not open to the defendants to question the validity of the mortgage bond.

The Advocate-General (Mr P. C'Kinealy) (Babu Baikanta Nath Das and Babu Priya Nath Sen, with him), for the respondents, contended that the words used in sec. 26 of Act I of 1879 were 'claimable under the instrument,' while the words used in sec. 14 of Act XXXVI of 1860 were 'recoverable in a Court of Justice.'

The alteration is significant and must have been intentionally made to preclude a person claiming under an instrument from claiming more than the sum, for which the stamp duty was paid; the plaintiff in this case had already recovered the sum for which the stamp duty had been paid, so that he had already got the amount claimable under the instrument, and could not now claim anything more. The agreement between the parties as embodied in the bond was not enforceable in its entirety, and in so far as it was not enforceable, it was void: sec. 2 of the Indian Contract Act.

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RAMPINI AND BODILLY JJ. The question raised in this appeal is whether a plaintiff can sue on a mortgage bond for Rs. 10,000 entered into to secure future advances, when more than that sum had been realized by him privately. The Subordinate Judge held that he cannot.

Mr. Hill for the appellant contends that the Subordinate Judge is wrong. We have no doubt that this is so. The bond was given as security for sums advanced on a running account, and it was evidently intended that, when advances of the amount specified in the bond had been either wholly or partially paid off, it should continue as a security for fresh advances up to the limit specified. The advances made never at any time exceeded Rs. 10,000, but advances to the extent of more than four times that amount were made and from time to time paid off. The Subordinate Judge has held that this precludes the plaintiff from now suing on the bond, which had been stamped with a stamp of Rs. 50, which is sufficient to cover the sum of Rs. 10,000 only. He rests his decision on the terms of sec. 26 of the Stamp Act, I of 1879, which is to the effect that "nothing shall be claimable under such instrument more than the highest amount or value for which the stamp actually used would have been sufficient." He contrasts the terms of this section with those of sec. 14 of the Stamp Act XXXVI of 1860, which were to the effect:—"No larger sum shall be *recoverable* in any Court of Justice by reason of any deed, &c." We think, however, that the word "claimable" in sec. 26 of Act I of

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1879 means "claimable in a Court of Justice." In any case, they do not mean that sums paid privately to the mortgagees without any dispute or necessity for the enforcement of the bond are to be taken into account when the plaintiff brings a suit on the bond for the enforcement of the mortgage security.

We decree this appeal with costs and remand the case to the lower Court for disposal on the merits.

Appeal decreed.

M. N. R.
