APPEAL FROM ORIGINAL CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, Mr. Justice Hill and Mr. Justice Stevens.

1903
Jan. 19.

JOGINI MOHAN CHATTERJI
v.
BHOOT NATH GHOSAL.*

Mortgage—Property comprised in mortgage, non-existence of—Onus of proof.

In a suit to enforce a mortgage bond which was registered in the Sealdah Registry, on the ground that one of the properties mortgaged was in the Sealdah district, the defendant set up the defence that inasmuch as there was no such property in existence in the Sealdah district, the registration of the mortgage was bad, and the deed as a mortgage had no efficacy in law:—

Held, that the onus was on the defendant to show with every clearness that no property in the Sealdah district had been comprised in the mortgage.

APPEAL by the plaintiff, Jogini Mohan Chatterji, from the judgment of AMEER ALI J., dated April 29, 1902.

The suit was originally brought by the plaintiff as Receiver of the estate of one Nobin Chunder Gangooly, deceased, to recover Rs. 1,000 with interest due on a registered mortgage-bond dated 10th October 1896.

The defendant, Bhoot Nath Ghosal, borrowed from the said Nobin Chunder Gangooly, a sum of Rs. 1,000, repayable at the end of one year from the date of the loan, together with interest at 24 per cent. per annum, and as security thereof executed a bond mortgaging certain immoveable properties situated partly within and partly without the local jurisdiction of the High Court. The mortgage-bond was registered at the Sealdah Sub-Registrar's office on the allegation that one of the properties mortgaged thereunder was situate in the Sealdah district.

On the 10th October 1898, Nobin Chunder Gangooly died, leaving a will, and in December 1900 certain beneficiaries under the will brought a suit for the administration of Nobin Chunder's estate. The plaintiff, an advocate of the High Court, was appointed Receiver of the said estate, and he instituted this suit for

* Appeal from Original Civil, No. 15 of 1902, in suit No. 686 of 1901.

the amount due on the bond. The defendant contended that there was no property within the jurisdiction of the Sub-Registrar of Sealdah; and that as the deed was registered at the Sealdah Registration Office, without any jurisdiction, the document could not take effect as a mortgage.

The judgment of the Court below was reported at p. 658 of the I. L. Reports, 29 Calcutta Series. The learned Judge was of opinion that upon the evidence adduced he was not satisfied that there was any property belonging to the defendant within the jurisdiction of the Sub-Registrar of Sealdah, and therefore the document could not take effect as a mortgage deed.

The plaintiff now appealed mainly on the grounds that the defendant was estopped from raising the question of validity of the registration and of the mortgage-deed; and that he had failed to prove that the property (in Sealdah) did not exist.

Mr. Sinha (*Mr. O'Kinealy* with him) for the appellant. The point here is, whether the respondent is entitled to say that there is no such property in Sealdah, he being the mortgagor. My contention is that he is estopped from showing that there is no such property. The onus is on the respondent to show that the property in Sealdah does not exist,—and that he has not established.

Mr. A. Chaudhuri (*Mr. S. R. Das* with him) for the respondents. The lower Court has found upon the evidence that there is no such property in Sealdah. I am entitled to show that the mortgage bond is not a valid document, and that there is no such property. If it is shown that there is no such property, then the registration cannot be considered valid at all: see s. 49 of the Registration Act. The appellant must satisfy the Court that this was a valid mortgage: see ss. 92 and 115 of the Evidence Act. The question of estoppel does not arise in this case. I submit the judgment of the Court below ought to be upheld.

Mr. Sinha in reply.

MACLEAN C.J. This is a very short matter. The suit is one to enforce a mortgage. The defendant, who was a young

1903

JOGINI MOHAN CHATTERJI v. BHOOT NATH GHOSAL.

MACLEAN C.J.

man at the date he gave it, set up various defences of fraud and so forth, all of which have been found against him. The only point for our decision is this. In the schedule (A) to the mortgage deed, item (I) is described as "The undivided one cottah four chittacks of land more or less comprising premises No. 251-2, Upper Circular Road, Holding No. 49, Subdivision XIV, Division II, Mouzah Manicktollah, Thanah Manicktollah, Sub-Registry Sealdah," and so forth; and the earlier part of the deed contains this statement: "Out of the properties mentioned in Schedule (A) below, the property mentioned in item (I) of the said schedule is the land purchased with my self-acquired money." This mortgage which also comprised certain property in Calcutta was registered in the Sealdah Registry, which would be quite right, assuming that the mortgage comprised any property in the Sealdah district. But now, when the plaintiff seeks to enforce his mortgage, the defendant says that there is no such property in the Sealdah district as that to which I have referred, and which is mentioned in the mortgage, and consequently, under the Registration Act, the registration of the mortgage in the Sealdah Sub-Registry was bad, and the deed as a mortgage has no efficacy in law.

The Court below has taken this view: hence the present appeal by the mortgagor. Two questions arise upon this defence: the *first* is whether the defendant has in fact substantiated that there was no such property in the Sealdah district as that which is described in the mortgage and purports to be comprised in it; and, *secondly*, if there were no such property, whether it lies in the month of the defendant to raise this objection, or, in other words, whether he is not estopped by his own declaration and by his own conduct from doing so.

Upon the question of fact, to enable him to succeed, the defendant ought to show with every clearness that no property in the Sealdah district was comprised in the mortgage. What is his evidence? The witness Nobin Chunder Mookerjee, who is a clerk in the Calcutta Municipality—one of the assessment clerks—is asked this question:

Q. "By looking into this book can you say if there is any property at No. 152-2, Upper Circular Road?"

A. "No. There is none. I have seen entries from 1892 to 1900."

But he adds:—"That beyond the statement that there is no such entry in the book, I cannot say that there is no property at that number."

Then to the Court he says: "The book would have shown if any house was at No. 251-2 Upper Circular Road."

In the description in the mortgage there is no reference to any house. It does not follow that because there is no entry in the book to show that there is a house numbered 251-2, that is sufficient to show conclusively that as a matter of fact there was no such property as that which is mentioned in the schedule to the mortgage. I do not think any reliance can be placed on the evidence of the defendant on this point, nor does the evidence of Annoda Prosad add much, in my mind, to the defendant's case. As against this there is the purchase-deed from Narain Chunder Desmuk to the defendant, which has not been found not to be genuine. On this evidence I am not disposed to think that the defendant has substantiated his case, and the appeal must succeed on this point.

Apart from that, and speaking for myself, I am disposed to take the view that, having regard to the provisions of section 115 of the Evidence Act, the defendant is estopped from raising this point. In expressing this opinion, I do not express it finally though that is the inclination of my mind, I am not unmindful of certain cases in the English Courts where it has been held that, where deeds have been executed in contravention of some statute, the law of estoppel does not apply.

The appeal must be allowed and the usual mortgage-decree made, and the costs of the plaintiff of this appeal and of the lower Court added to his security.

HILL J. I agree in thinking that this appeal must be allowed and on the ground upon which the learned Chief Justice has placed the matter. But I prefer to refrain from expressing any opinion upon the question of estoppel, as none of the authorities upon the question had been gone into in the argument, and as it appears to me to be one of some nicety and difficulty.

1903

JOGINI MOHAN CHATTERJI v. BHOOT NATH GHOSAL.

STEVENS J. I concur in thinking that this appeal should be allowed upon the facts, without expressing any decided opinion upon the question of law which has been raised for the appellant.

Appeal allowed.

Attorney for the appellant: *M. M. Chatterji.*

Attorney for the respondent: *S. S. Banerji.*

R. G. M.

ORIGINAL CIVIL.

Before Mr. Justice Sale.

1903

Nov. 30.

HINGA BIBEE

v.

MUNNA BIBEE AND OTHERS.*

Suit, Restoration of—Limitation—Dismissal of Suit—Adjournment—Civil Procedure Code (Act XIV of 1882) ss. 102, 103, 155—Limitation Act (XV of 1877), Sch. II, Art. 163—Notice of motion—"Sufficient Cause."—Practice.

Where a suit is dismissed for want of prosecution, an application for its restoration must be made within 30 days of such dismissal; and a notice that the application would be made on a future date does not prevent limitation from running.

Khetter Mohun Sing v. *Kassy Nath Sett*(1) followed.

Where the long vacation intervenes, to save limitation the matter must be mentioned on the first day after the reopening of the Court—that is the first day on which the Court sits.

Semble: An appearance by counsel on the calling on of a case merely to ask for an adjournment, is not such an appearance in the suit as will necessarily render ss. 102 and 103 of the Civil Procedure Code inapplicable.

MOTION.

This was an application made on behalf of the plaintiff for the restoration of a suit which had been dismissed by HARINGTON J. on the 10th of August 1903 under the following circumstances:—

On the 28th of July 1903, the suit appeared on the peremptory list and was not called on for hearing until the 10th of the

* Application in Original Civil Suit No. 239 of 1900.

(1) (1893) I. L. R. 20 Calc. 892.