(1873) 06 CAL CK 0001

Calcutta High Court

Case No: None

Shamloll Khettry and Others		APPELLANT
	Vs	
Kedarnath Dutt and Another		RESPONDENT

Date of Decision: June 9, 1873

Final Decision: Dismissed

Judgement

Sir Richard Couch, Kt., C.J.

This is a suit in which the plaintiff prayed that it might be declared that he held a valid equitable mortgage on certain premises mentioned in the plaint, and that an account might be taken of what was due and owing to him as equitable mortgage in respect of a loan made by him to the defendant Woomachurn Banerjee. The premises upon which he asked it might be declared that he had an equitable mortgage belonged to Woomachurn Banerjee, and had been purchased by the defendants Kedarnath Dutt and Madhub Chunder Bose under an execution against Woomachurn Banerjee, and it is said, with notice, at the time of the sale, of the claim of the plaintiff. The evidence of the plaintiff, who was the only witness examined, was that he made an advance of money to Woomachurn Banerjee on a deposit of the title-deeds of property belonging to him situated in Mirzapore; that Woomachurn Banerjee having been to him several times before, the plaintiff told him if he could give him a deposit of title-deeds, or security of that sort, he could advance him the money; that Woomachurn said he had landed property and the title-deeds of it, and would give them to him. The witness then said:--"He" (Woomachurn) "continued, "I will place them as deposit with you, and also give you a note of hand." He brought me title-deeds on that same day, 16th Chaitra 1277 (29th March 1871), not quite two years ago. He brought me the title-deeds at 8 o''clock in the morning. That was the occasion he received and took the money away having brought the deeds. Before that a pucca arrangement had been come to between me and him. It was not then reduced into writing. A writing was made when I paid the money that same day at 6 o''clock in the evening. I gave him the money at 8 o''clock in the morning actually

before the writing took place. I got the title-deeds from him at 8 o''clock in the morning before I gave the money." The year 1271 in the note of the evidence must be a mistake, as that would be nine years ago. The time is shown by the promissory note to be the 29th of March 1871. He then said that he saw him again at 5 o''clock in the evening, and he then gave him a document which bears his signature. It is set out in the plaint, and is a promissory note dated the 29th of March 1871, whereby Woomachurn Banerjee promised "to pay to Shamloll Khettry or order, the sum of Rs. 1,200, with interest at the rate of 24 per cent, per annum, for value received in cash." It bears an endorsement in these words [reads Ante, p. 406].

2. Macpherson, J., by whom the case was tried, gave a very short judgment, saying he was of opinion that the transaction was complete in the morning. He says [reads Ante, p. 407].

3. We do not entirely agree in the view which the learned Judge took of the evidence of the plaintiff. We rather think that the transaction was not completed until the promissory note was given, and that the plaintiff''s evidence to the contrary is probably not true; but, in the view we take of the question, it is not material to determine whether there was a complete equitable mortgage before the promissory note was given, or whether that was the completion of the transaction.

4. It was objected that the memorandum, which I have read, ought to have been registered under the Indian Registration Act of 1866; and as it had not been, it could not be received in evidence, and consequently the plaintiff could not establish his equitable mortgage. The words of the Act upon which the objection is founded are in s. 17, the 2nd clause of which enumerates, amongst the instruments which shall be registered, "instruments, other than an instrument of gift, which purport or operate to create, declare, assign, limit, or extinguish, whether in present or in future, any right, title, or interest, whether vested or contingent, of the value of Rs. 100 and upwards, to or in immoveable property." S. 21 of the same Act requires that no instrument relating to immoveable property shall be accepted for registration unless it shall contain a description of the property sufficient to identify it. In fact, if this memorandum had been presented for registration, it must have been rejected. Although the transaction is of a description which is usual with merchants when an immediate advance of money is required, if the charge upon the property is made by a written instrument, care must be taken to describe it accurately. It is not unlikely that many instruments may be defective on that account. But that cannot be allowed to affect the construction of the Act. If this instrument came within s. 17, it was the duty of the parties to see that it contained what s. 21 requires. Is the memorandum which I have read an instrument within the meaning of the words in s. 17? Was there not a valid equitable mortgage independently of it?

5. The nature of an equitable mortgage is well known. But as we are discussing the matter with reference to the Registration Act, it may be well to refer to what Lord Eldon says about it. In Ex parte Wright 19 Ves., 255, see 258 he says that the deposit of

title-deeds is "evidence of an agreement for a mortgage, and an equitable title to a mortgage," that is, the title created by the agreement is, in a Court of Equity, "as good as a legal title." Hence the way in which Courts of Equity gave effect to a deposit of title-deeds. It is true that this doctrine has been questioned by some Judges, but it has been upon a ground which would not be applicable to a case like the present. It would not be applicable to a great majority of transactions in India, the ground being that it appeared to be opposed to the Statute of Frauds which required a writing where any interest in land was transferred; and although objections have been made to the doctrine on that account, it has been constantly acted upon in the Courts in England, and must be considered as fully established, as Lord Abinger said in Keys v. Williams 3 Y. & C., 55, see 60 and 61:--"It appears to have arisen from the necessity of the case. It may, however, in many cases, operate to useful purposes, and is certainly not injurious to commerce. In commercial transactions it may be frequently necessary to raise money on a sudden, before an opportunity can be afforded of investigating the title-deeds and preparing the mortgage. Expediency therefore, as well as necessity, has contributed to establish the general doctrine, although it may not altogether be in consistency with the statute." Many cases in the English Courts might be referred to, as showing how the doctrine is acted upon. But it is enough to notice the case which was quoted to us in the course of the argument--Neve v. Pennell 2 H. & M., 170--where, as to one of the sums of money claimed, the ■3,000 which was an advance made at the time the title-deeds were deposited, no question was raised as to the validity of the mortgage. The question in the case was raised with reference to the sum of ■4,000, which was subsequently advanced, and as to which it was necessary to have some writing in order to show that the title-deeds, which had been deposited and were in the hands of the equitable mortgage, were to be security for that sum. The case shows how entirely the doctrine of equitable mortgage was treated as established. Then what we have to consider is, did the memorandum, which was endorsed on the promissory note, make any difference in the transaction?

6. The rule with regard to writings is that oral proof cannot be substituted for the written evidence of any contract which the parties have put into writing. And the reason is that the writing is tacitly considered by the parties themselves as the only repository, and the appropriate evidence, of their agreement. If this memorandum was of such a nature that it could be treated as the contract for the mortgage, and what the parties considered to be the only repository and appropriate evidence of their agreement, it would be the instrument by which the equitable mortgage was created, and would come within s. 17 of the Registration Act. But it was not a writing of that character. As I have said, the equitable mortgage was created by the agreement which was evidenced by the loan and the deposit of the title-deeds: the promissory note, whether given either at the same time or some hours afterwards, in pursuance of the understanding between the parties, was evidence of the terms upon which the loan was made, viz., that the interest should be at the rate of 24 percent. But as regards the contract between the parties, if there had been no memorandum at all on the promissory note, there would have been a complete

equitable mortgage. When we consider what the memorandum is, we find it is not the contract for the mortgage,--not the agreement to give a mortgage for the Rs. 1,200, but nothing more than a statement by Woomachurn Banerjee of the fact from which the agreement is inferred. It is an admission by him that he had deposited the deeds upon the advance of the money for which the promissory note was given. It is not by the memorandum that the Court takes the agreement for the mortgage to be proved, but by the deposit of the deeds, and this is no more than a piece of evidence showing the fact of the deposit which might be proved by any other evidence. The memorandum need not have been produced. That this is the nature of such a memorandum as this appears from a decision of the Court of Queen''s Bench in Blackwell v. McNaughtan 1 Q.B., 127. Of course, I refer to this decision more as an illustration of what I have been stating than as an authority which binds us. We are to determine what is the law under the Registration Act. But this decision illustrates what I have been saying about this memorandum. The question arose there not upon a Registration Act, but on the Stamp Act; but the reasoning of the Court is equally applicable. The action was upon a contract to redeliver, on request, wine which had been placed in the defendant''s care. The plaintiffs offered in evidence a writing signed by the defendant, which was in substance as follows:--"This is to certify that Mr. McNaughtan has in his cellar, belonging to Mrs. Hartly, that is paid for, twelve dozen of portwine. March 5th, 1823." It was objected that this writing was not admissible without a stamp. The late Chief Baron, Sir Frederick Pollock, in moving for a new trial, argued that it was evidence of a contract, and ought therefore to have had an agreement stamp. Lord Denman, the Judge who had tried the case, said:--"I thought the certificate was not proof of a contract, but proof of an independent fact from which, among others, a contract might be inferred, if the case were sufficiently made out." Coleridge, J., said:--"This writing was merely evidence of a fact from which the plaintiffs sought to infer a contract," which is precisely the case here. The result was that the Court refused the rule for a new trial, and upheld the decision of Lord Denman, who read the judgment of Lord Tenterden in Mullett v. Huckison 7 B. & C., 639.

7. On the ground therefore that this was not a writing which the parties had made as the evidence of their contract, but only a writing which was evidence of the fact from which the contract was to be inferred, I think it does not come within the description of documents in the 17th section of the Registration Act. A decision of Phear, J., in the case of Dwarkanath Mitter v. S.M. Sarat Kumari Dasi 7 B.L.R., 55 was quoted, which I think is distinguishable from the present case. In that case the facts appear to have been similar to what they were in Neve v. Pennell 2 H. & M., 170 in regard to the sum of Rs. 4,000. The letter which Phear, J., held to require registration, as being a document creating a charge on land, was written after the debt had been incurred and was sent with the title-deeds. There was not in that case that which was evidence of an agreement to give a mortgage, namely, the loan of the money accompanied by the deposit of the title-deeds. Without some letter or verbal communication, there would have been nothing to attach the debt which had been incurred to the deposit of the deeds. It seems to me that the decision is distinguishable from the present case, and that, for the reasons I have given,

we ought to hold that the decision of Macpherson, J., is right, and that this appeal should be dismissed. The appeal is dismissed with costs on scale 2.