

(1918) 02 CAL CK 0033

Calcutta High Court

Case No: None

Sakhiuddin Saha and Others

APPELLANT

Vs

Sonaulla Sarkar and Others

RESPONDENT

Date of Decision: Feb. 8, 1918

Acts Referred:

- Registration Act, 1908 - Section 17(b)
- Transfer of Property Act, 1882 - Section 54

Citation: 45 Ind. Cas. 986

Hon'ble Judges: Richardson, J; Beachcroft, J

Bench: Division Bench

Judgement

Richardson, J.

This is a suit brought by the plaintiffs as mortgagees to enforce their security. Plaintiff No. 12 is one of the two original mortgagees and plaintiffs Nos. 1-11 are the heirs and the successors of the other. The defendants Nos. 1-3 are the mortgagors. Subsequent to the mortgage defendants Nos. 4, 5 and 6 purchased a portion of the mortgaged property and defendant No. 7 took a puisne mortgage of the remainder. In connection with those transactions, however, it has been found, and cannot now be disputed, that the plaintiffs Nos. 1, 2 and 12 led the defendants Nos. 4-7 to believe that the whole property was unencumbered. The position, therefore, is that the plaintiffs Nos. 1, 2 and 12 are precluded by the doctrine of estoppel from setting up their rights under the prior mortgage as against those defendants.

2. In that state of things the courts below have concurred, in dismissing the suit so far as the plaintiffs Nos. 1, 2 and 12 are concerned and in making in favour of the remaining plaintiffs a mortgage decree in the usual form entitling them to sell the whole of the mortgaged property in satisfaction of their share of the original mortgage debt.

3. The plaintiffs have appealed to this Court and the first point which arises is free from difficulty.

4. As regards the defendants Nos. 4 to 6, who took an apparently absolute title to the portion of the property which they purchased, the claim of the plaintiffs Nos. 1, 2 and 12 has been rightly dismissed, But as regards the defendant No. 7 the effect of the estoppel, u/s 78 of the Transfer of Property Act, is to postpone them (in respect of their share of the original debt) to that defendant. As between the plaintiffs Nos. 1, 2 and 12 and the defendant No. 7, therefore, the suit should not be dismissed and the decree should declare that the property mortgaged to the defendant No. 7 is hypothecated to the plaintiffs Nos. 1, 2 and 12 for their share of the original mortgage-debt and that their rights as mortgagees are postponed to those of the defendant No. 7. The decrees of the Courts below will be modified accordingly.

5. The further contention on behalf of the plaintiffs, who may be described as innocent plaintiffs, that they are in a position to demand that a decree should be made in favour of the mortgagees as a body for the whole of the mortgage-debt, is untenable. Nor are we obliged to tell the defendants Nos. 4-7 that their only remedy lies in an action for deceit. In equity co-mortgagees are presumably tenants-in-common of the mortgaged debt and their interests are severable or among themselves. One of them can sue on the mortgage, provided those who are unwilling to be joined, as plaintiffs are made defendants. *Davenport v. James* (1847) 7 Hare 249 : 12 Jur. 827 : 68 E.R. 102 : 82 R.R. 98. There is nothing to take the present case out of the general rule. The innocent plaintiffs are not damnified by the way in which the case has been dealt with. Some of the mortgagees have by their conduct precluded themselves from enforcing their rights under the mortgage, and it was open to the Court to sever their interests from those of the mortgagees who were under no disability or disqualification and to make a decree in favour of the latter in proportion to their interest in the debt.

6. The contention last dealt with has been advanced solely for the purpose of evading the ruling of the Courts below on another question which has given rise to some discussion before us. The two original mortgagees were brothers and they each had an eight-annas share in the mortgage. It is said that there was a partition of the joint property by which the bond in suit was allotted to the deceased brother, the predecessor of the plaintiffs Nos. 1-11. On that footing the plaintiff No. 12 was in the first instance made a defendant. He was made a plaintiff by direction of the learned Munsif when he found that the partition had not been proved, a finding which has been affirmed by the learned Subordinate Judge. The objection taken is that in dealing with this part of the case the Courts below have wrongly refused to receive in evidence two documents by which the partition of the bonds in which the brothers had a joint interest was effected. These documents are not registered and have been rejected on that ground on the authority of *Upendra Nath Banerjee v. Times Chandra Banerjee* 6 Ind. Cas. 316 : 12 C.L.J. 25 : 15 C.W.N. 375. where it was

held that a deed of partition, either declaring certain rights over Immovable property or reciting the allotment of lands and containing an agreement to act accordingly, is compulsorily registrable. In my opinion the rejection of these documents has, as the language of the two judgments shows, largely influenced the conclusion at which the Courts below have arrived on the question of partition or no partition. If the Subordinate Judge intended to say that even if these documents be taken into account, the partition is not proved, he has not expressed himself very happily. The point raised, therefore, seems to me to require consideration.

7. It is contended for the plaintiffs that the case cited below has no application, because the transfer of a simple mortgage such as the bond in suit or a share in such a mortgage is not a transfer of Immovable property within the meaning of Section 54 of the Transfer of Property Act, and the document by which the transfer is effected is not a document which purports or operates "to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent...to or in Immovable property" within the meaning of Section 17 (b) of the Indian Registration Act.

8. In support of this contention it is said that the transfer of a simple mortgage is merely the transfer of a debt on which the security is attendant, the security passing to the transferee with the debt u/s 8 of the Transfer of Property Act.

9. For authority, reference is made to Gous Mahomed v. Khawas Ali Khan 28 C. 450 : 12 Ind. Dec. (N.S.) 300; Baij Nath Lohea v. Binoyendra Nath Palit 6 C.W.N. 5 and Ram Ratan Chuckerbutty v. Jogesh Chandra Bhattacharya 12 C.W.N. 625. These cases are perhaps not entirely consistent with the earlier decision of this Court in Koob Lall Chowdhry v. Nittymanund Singh 9 C. 839 : 12 C.L.R. 393 : 8 Ind. Jur. 38 : 4 Ind. Dec. (N.S.) 1208 or with the decision of the Allahabad High Court in Abdul Majid v. Muhammad Faizullah 13 A. 89 : A.W.N. (1890) 186 : 7 Ind. Dec. (N.S.) 55. However that may be, they relate to the transfer of mortgage decrees and the considerations which apply to such transfers may not be altogether applicable to the transfer of mortgage bonds. Order XXI, Rule 16, of the CPC appears to contemplate the transfer of a decree "by assignment in writing," though the Code does not say whether the writing must be registered when the decree transferred is a mortgage decree.

10. If, therefore, we confine ourselves to transfers of mortgage bonds or mortgages, it has first to be noticed that "a debt secured by mortgage of Immovable property" is expressly excluded from the definition of actionable claim" added to Section 3 of the Transfer of Property Act by the Amending Act of 1900 (Act No. II of 1900). And inasmuch as Section 8 of the Act speaks of a debt or other actionable claim" (in the clause which deals with the passing of the securities therefor), Section 8 can be of no assistance to the appellants for the present purpose, though in other connections the principle underlying the section will, no doubt, be applicable (Ghose's Law of Mortgage in India, 7th Edition, Volume I, pages 70,71, and Volume II, page 667).

11. The transfer of actionable claims is governed by Section 130 of the Act which requires the execution of an instrument in writing signed by the transferor or his duly authorized agent, and it can hardly be supposed that debts secured by mortgages of Immovable property were excluded from the definition of actionable claims in order that they might pass by word of mouth without any writing. The inference would seem to be that the Legislature regarded such debts as immovable property within the definition in Section 3 (25) of the General Clauses Act of 1897. "Immoveable property" shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth." For the purposes of the Transfer of Property Act that definition is only qualified by the clause in Section 3 of that Act which says that "Immoveable property" does not include standing timber, growing crops or grass."

12. And if a mortgage-debt is within the definition of Immovable property in the General Clauses Act, it is also within the definition of such property in Section 2(6) of the Registration Act of 1908.

13. It would follow that a mortgage-debt is Immovable property both for the purposes of Section 54 of the Transfer of Property Act and for the purposes of Section 17(b) of the Registration Act.

14. If that be the true view, it would be sufficient in the case before us to say that where a mortgage-debt is transferred by an instrument in writing and the value of the right, title or interest transferred is one hundred rupees or more, the writing requires registration under the Registration Act.

15. In the work already referred to the learned author remarks, quite generally and without reference to any statutory definition, that "whatever may be the form of the mortgage, it operates as a transfer of an interest in the land which is given as security." (The Law of Mortgages in India, 4th Edition, Volume I, page 72.) If a mortgage, even a simple mortgage, creates an interest in land, its transfer must be the transfer of an interest in land. In the Second Volume of the same work at page 729, it is said that "a mortgage on land is Immovable property" and reference is made to Hoyle, In re: Row v. Jagg (1911) 1 Ch. 179 : 80 L.J. Ch. 274 : 103 L.T. 817 : 55 S.J. 169 : 27 T.L.R. 131.

16. The learned Pleader for the plaintiff cited the cases of *Malcolm v. Charlesworth* (1836) 1 Keen 63 : 43 E.R. 230 : 44 R.R. 19 and *Gresham Life Assurance Society v. Crowther* (1915) 1 Ch. 214 : 84 L.J. Ch. 312. But those cases turn on the provisions of an English Statute which permit the registration of assurances by which lands are affected," and have no application to the different language of the Indian Registration Act.

17. The conclusion at which I arrive is that the cases on which the learned Pleader relies are at any rate distinguishable and that the Courts below have taken a correct view of the requirements of the Registration Act. We are not referred to any decision

of this Court precisely in point, but the conclusion is supported by the ruling of the Bombay High Court in *Ganpat Pandurang v. Adarji Dadabhai* 3 B. 312 : 2 Ind. Dec. (N.S.) 209. and see also *Joharmal v. Tejram Jagrup* 17 B. 235 : 9 Ind Dec. (N.S.) 154.

18. The result is that in my opinion subject to the modification above directed the decrees of the Courts below should be affirmed and the appeal dismissed. The appellants having substantially failed, the respondents are entitled to their costs of the appeal.

Beachcroft, J.

19. I agree that the appeal should be dismissed subject to the modification in the decree proposed by my learned brother for the reason given by him.

20. But I express no opinion on the question whether the learned Subordinate Judge was right in his view on the question of registration for, as I understand his judgment, he finds as a fact that no partition was made between Bhetu and Netu, whether the evidence which he holds to be inadmissible be excluded from or taken into consideration.