(1911) 08 CAL CK 0043

Calcutta High Court

Case No: Appeal from Appellate Decree No. 1917 of 1909

Jadunandan Prosad Singh		APPELLANT
	Vs	
Deo Narain Singh and others		RESPONDENT

Date of Decision: Aug. 24, 1911

Final Decision: Allowed

Judgement

1. This appeal is directed against the decree in a suit to enforce a mortgage security executed by the first Defendant in favour of the Plaintiff. The second Defendant is alleged to have subsequently acquired an interest in the equity of redemption and has been joined as a party in that character. The third and fourth Defendants claim to be mortgagees under an instrument, dated the 21st January 1908 : the fifth Defendant sets up a mortgage alleged to have been granted on the 13th January 1908. The sixth Defendant holds a mortgage executed on the 14th September 1907, and the seventh Defendant sets up a mortgage granted on the 6th January 1908. The date of the mortgage bond which the Plaintiff seeks to enforce is the 19th January 1908, but it appears on the face of it to have been altered to the 23rd January 1908. In the Court of first instance, there were two matters substantially in controversy between the parties, namely, first, whether the mortgage of the Plaintiff took effect from the 19th January 1908, i.e., whether it was entitled to priority over the mortgage of the third and fourth Defendants : and, secondly, whether the mortgage set up by the fifth Defendant represented a genuine transaction. The Court held upon the first question in favour of the Plaintiff, and upon the second question against the fifth Defendant. The fifth Defendant thereupon appealed to the Subordinate Judge, and he joined as parties Respondents the Plaintiff and the remaining Defendants. Of the latter the third and fourth Defendants preferred a cross-objection, under Rule 22 of Or. 41 of the Civil Procedure Code, to the effect that the mortgage set up by the Plaintiff took effect only from the 23rd January 1908, and was not entitled to priority over their security. The Subordinate Judge allowed the appeal as also the cross-objection. He found upon the evidence that the mortgage set up by the fifth Defendant was not a collusive transaction, and that the

mortgage sought to be enforced by the Plaintiff took effect from the altered date, the 23rd January 1908. The Plaintiff has now appealed to this Court, and on his behalf the decision of the Subordinate Judge has been assailed on three grounds, namely, first, that the mortgage of the fifth Defendant is collusive, and the finding of the Subordinate Judge to the contrary is not supported by the reasons assigned by him, secondly, that it was not competent to the third and fourth Defendants to prefer a cross-objection against the Plaintiff upon an appeal preferred by the fifth Defendant, and, thirdly, that, upon the facts found, the mortgage of the Plaintiff took effect from the date of execution and not from any subsequent period. In so far as the first ground is concerned, it cannot be supported. We have examined the reasons assigned by the Subordinate Judge in support of his conclusion as to the true character of the mortgage set up by the fifth Defendant. These grounds do not involve any error of law, and it is not open to this Court to consider whether the Subordinate Judge has taken a correct view of the facts. The first ground, therefore, fails.

2. In so far as the second ground is concerned, it raises an important question which was not suggested in the Court below. No objection appears to have been taken before the Subordinate Judge as to the competency of the cross-objection by the third and fourth Defendants; that, however, does not preclude a consideration of the point by this Court : if the cross-objection was really incompetent, the omission of the Plaintiff to take exception to it could not possibly validate the same. Now it is not disputed that Or. 41, r. 22, sub-r. (1) of the Code of 1908 is comprehensive enough so far as its language in concerned, to admit of a cross-objection by one Respondent against another. But it has been urged that the reason of the rule requires that some limitation should be put upon its scope and application. Reference has been made to judicial decisions under the Codes of 1859 (Act VIII of 1859, sec. 348) and 1882 (Act XIV of 1882, sec. 561) to show that such restriction is justifiable on principle. [Anwar Jan v. Azmat Ali 15 W.R. 26 (1871), Bishun Chandra v. Jogendra Nath ILR 26 Cal. 114 (1898), Shabiuddin v. Deomoorai ILR 30 Cal. 655 (1903) and Kallu v. Munni ILR 23 All. 93 (1900)]. That principle is that, as a general rule, the right of any Respondent to urge a cross-objection should be limited to his urging it only against the Appellant : and it is only by way of exception to this general rule that one Respondent may urge a cross-objection as against another Respondent : the exception, it is said, holds good in those cases where the appeal opens up questions which cannot be disposed of completely without matters being allowed to be opened up as between co-Respondents. This may be accepted as a sound principle, but, as was pointed out by Mr. Justice Banerjee in Bissen Chandra v. Jogendra Nath ILR 26 Cal. 114 (1898), no exhaustive rule on the subject can be formulated, and the true test ought to be, whether for the ends of justice, it is necessary that upon the appeal of one of the parties the matter should be reopened only so far as he is concerned or the whole case should be reviewed and some of the Respondents allowed the opportunity to urge a cross-objection against their

co-Respondents. One test of a negative character is sometimes useful : if the party, against whom a cross-objection is sought to be urged by his fellow Respondents, is not a necessary party to the appeal, the cross-objection can hardly be allowed to be urged. But if he is a necessary and proper party Respondent to the appeal, the answer to the question whether the cross-objection should be allowed to be urged must depend upon the circumstances of the case. The test to be applied is whether the questions which arise between the several sets of parties are so connected that one of them ought not to be allowed to re-open matters so far as he is concerned without opportunity allowed, in the interests of justice, to another to protect himself by urging his objections, even though they be directed, not against Appellant, but against a co-Respondent. Cases of the type of Abdul Ghani v. Muhammud ILR 28 All. 95 (1905) are fairly simple : if the Defendants have a common ground, upon an appeal by one of them, the Plaintiff may very well be allowed to urge a cross-objection against a Defendant-Respondent. The case before us, however, is of a special character, and is unlike any of those to be found in the books. Here the Plaintiff and third and fourth Defendants were so far united that their common interest was to defeat the fifth Defendant, who set up a heavy prior charge, which if real was entitled to precedence over both of them. If the fifth Defendant was defeated the question of priority as between themselves might be immaterial if the property was of sufficient value to satisfy the claim of both of them. (Sec. 48, Transfer of Property Act). Good reasons might therefore be assigned as to why the third and fourth Defendants did not prefer an appeal against the Plaintiff, although the first Court had overruled their contention that they were entitled to priority. But when they found that the fifth Defendant had preferred an appeal, they might injustice, contend that, if the appeal was successful, if would be material for them to urge that the decree of the first Court was erroneous in so far as it gave the Plaintiff a priority over them. To put the matter briefly, as soon as the Plaintiff and the third and fourth Defendants became unsuccessful against their common enemy, the 5th Defendant, the conflict of interest between them became important from a practical point of view. We are therefore not prepared to accept the contention that the rule on the subject should be narrowly defined and that a cross-objection should not be allowed unless the appeal directly opens up a question between co-Respondents. In our opinion the principle ought to be liberally applied and the case before us under the circumstances stated falls rather within the exception than within the rule. We may point out that Or. 41, Rule 22, sub-rule (3) introduces a modification of the rule as embodied in sec. 561 of the Code of 1882 : the effect of the alteration is to leave no doubt that a Respondent may prefer a cross-objection against a co-Respondent: the limits of the rule, however, are not attempted to be defined, and sub-rule (4) which has been added in the Code of 1908 may possibly create a difficulty in some cases. The present case, however, is reasonably free from difficulty, and we must hold that the cross-objection was competent. If the contrary view were maintained, the result would have followed that the first and fourth Defendants would have been driven to prefer a separate appeal, although if the fifth Defendant did not

prefer any appeal it might be wholly unnecessary for the third and fourth Defendants to proceed with their appeal for the protection of their own interest. The second ground urged by the Appellant therefore fails.

3. The third ground on which the judgment of the Subordinate Judge is assailed raises a question of some nicety. It has been found that the mortgage in favour of the Plaintiff was duly executed and attested on the 19th January 1908. The mortgagee however would naturally not part with his money till the deed was registered, and the mortgagor was also apparently unwilling to part with the document till he had got the money. The money was paid and the deed was registered on the 23rd January 1908. As we have already stated the mortgagor altered the date from the 19th to the 23rd January. The Subordinate Judge has found that this was done before registration, and was known to the mortgagee but it has not been found and the circumstances negative any possible suggestion that the mortgagee agreed that the deed would take effect from the 23rd January. Under sec. 47 of the Registration Act, upon registration the deed would take effect from the time it would have taken effect if registration had not been necessary. The question therefore arises from what date the deed took effect. The learned Vakil for the third and fourth Defendants has relied upon the cases of Sheo Narain v. Darbari 2 C.W.N. 207 (1897), Mouladan v. Raghunandan ILR 27 Cal. 7 (1899) and the Ramalinga v. Ayyadorai ILR 28 Mad. 124 (1904) to show that the deed would not take effect till it was delivered and the mortgage money paid. These cases, however, are of no real assistance to the Respondents. They merely show that the parties may intend that no obligation should attach under the deed unless a condition precedent had been fulfilled. Secs. 58 and 59 of the Transfer of Property Act show that a valid mortgage may be created to secure money to be advanced on a future debt. The case of Amrithathammal v. Periasami I.L.R 32 Mad. 325 (1997) shows further that valid title may pass even if no consideration is paid at the time of the conveyance. On the other hand, the third proviso to sec. 92 of the Indian Evidence Act indicates that the existence of a separate oral agreement constituting a condition precedent to the attaching of any obligation under a contract grant or disposition of property which has been reduced to the form of a document may be proved. In fact, the cases mentioned by the learned Vakil for the Respondents show that although a conveyance or a mortgage deed has been duly executed and attested, no obligation may attach thereunder, if the parties so agree, till certain conditions have been fulfilled. They do not show that upon fufilment of the condition precedent, the obligation attaches with effect from that date and not from the date of execution of the instrument. It may be assumed, therefore, that in the case before us, the conduct of the parties shows that no obligation was intended to attach under the mortgage deed till the money was paid by the mortgagee and the document presented to the proper officer for registration by the mortgagor although we are by no means satisfied that this inference may legitimately be drawn from the mere circumstance that the mortgagor did not, upon execution of the document, deliver

the same to the mortgagee. We are not prepared to hold that upon fulfilment of the condition the obligation attached with effect from the date of registration. As already explained sec. 47 of the Registration Act does not by any means support this view. We are not unmindful that under the law of England a common law deed, to be effective, must be delivered as the act and deed of the party expressed to be bound thereby as well as sealed (Laws of England, Ed. Halsbury, Vol. X, p. 385); but there is, in our opinion, no analogy between a common law deed in England and mortgage deed in this country. In the former case, delivery is essential for the validity of the deed : in the latter case, delivery is not essential although absence of delivery may serve to indicate that the parties intended that no obligation should attach under the instrument till a condition precedent had been fulfilled. There are, again, other points of fundamental difference, for instance, a common law deed is said to import consideration (Laws of England, Ed. Halsbury, Vol. X, p. 357) whereas if a suit was brought to enforce a mortgage security, the claim could be defeated on proof that there was no consideration. It must further be remembered, that even in England, in the case of deeds, the tendency of the Courts has been to interpret the term delivery rather liberally so as not to defeat the intention of the parties [Xenos v. Wickham L.R. 2 H.L. 296, 309, 312, 320, 323 (1867) and Exton v. Scott 6 Simon 31 (1833) as to which see, however, Cracknoll v. Janson 11 Ch. D. 2 (1879)]. Although, therefore, in England in the case of a common law deed title passes at the time of its delivery, we are not prepared to apply that rule to a case like the present where the instrument is valid in law without delivery, and where the delivery is postponed to secure the performance of mutual conditions, namely, registration of the document by the mortgagor and payment of the money by the mortgagee. No useful analogy can be drawn from another class of cases to which reference was made by the learned Vakil for the Respondents, namely, Hopkinson v. Roll 9 H.L.C. 514 (1861) and West v. Williams [1899] 1 Ch. 132. These cases discuss the question of priority of mortgages to secure future advances, dealt with in sec. 79 of the Transfer of Property Act. The doctrine that a first mortgagee should be postponed in respect of any advances made by him after notice of a subsequent incumbrance is plainly of no assistance to the Respondents. Although the mortgage of the Plaintiff was not registered till the 23rd January 1908, and that of the third and fourth Defendants had been registered on the day previous, each took effect from the date, when it would have taken if registration had not been necessary, that is prima facie from the date of its execution. The sole question is whether the operation of the mortgage instrument of the Plaintiff did not commence till the 23rd January, because it was not delivered till that date. For reasons already explained, we think this question ought to be answered in the negative. The alteration of the date by the mortgagor from the 19th January to the 23rd January did not clearly alter the position of the mortgagee. He plainly intended to take the property as security upon the title as it stood on the 19th January. No reasonable man of ordinary prudence would consent to take the property as it may stand on some uncertain future date, with the inevitable risk that the intending mortgagor may be at liberty meanwhile not merely

to create encumbrances on the property, but even transfer it absolutely. If such was the intention of the parties, it is inconceivable why the document was at all executed and attested on the 10th January 1908, the execution and attestation might very well have been postponed to the date of the actual payment of the consideration money. The obvious intention of the parties was to fix the security on the title as it stood on the 19th January, and they effectively did so, even though there was a collateral agreement that no obligation should attach under the instrument till payment of money on the one hand and delivery to the registering officer on the other. The moment the condition was fulfilled obligation attached with effect from the date of execution and attestation of the document, notwithstanding the execution and registration of another mortgage instrument by the mortgagor in the interval. There is no special hardship on the subsequent encumbrancer, because as in this country documents do not take effect from the date of registration, every person who acquires property takes it subject to the risk that there may be a prior tide created within the preceding four months or in some instances, even eight months (secs. 23 and 24 of the Registration Act). We must consequently hold that the mortgage set up by the Plaintiff took effect from the 19th January 1908 and was entitled to priority over that of the third and fourth Defendants executed on the 21st January 1908.

4. The result, therefore, is that this appeal must be allowed in part and the decree of the Subordinate Judge modified. The Plaintiff will have a decree on his mortgage in the usual form. It will be declared that he is entitled to priority over the mortgage of the third and fourth Defendants, but not over that of the fifth Defendant. The Plaintiff will pay the costs of the fifth Defendant in all the Courts, but will receive all his costs from the first, third and fourth Defendants. The suit is dismissed as against the second Defendant who was unnecessarily made a party and who will have his costs in the first Court only, but no pleader''s fees, from the Plaintiff. A self-contained decree will be drawn up in this Court in supersession of the decree of the Subordinate Judge.